(23,022)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1912.

## No 524.

J. C. BACCUS, PLAINTIFF IN ERROR.

*vs.*

THE STATE OF LOUISIANA.

IN ERROR TO THE THIRD JUDICIAL DISTRICT COURT, PARISH OF CLAIBORNE, STATE OF LOUISIANA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1912.

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1 (*Bill of Information.*)

STATE OF LOUISIANA,
*Parish of Claiborne:*

In the Third Judicial District of Louisiana.

I, William C. Barnette, District Attorney for the Third Judicial District of Louisiana, who in the name and by the authority of the State, prosecute in its behalf, with the permission of the Court first had, come into the said District Court on this the — day of —— in the year of our Lord, One Thousand Nine Hundred and — and give the said Court, to understand and be informed that J. C. Baccus, late of the Parish of Claiborne, on the first day of July, in the year of our Lord, One Thousand Nine Hundred and Eleven at and in the Parish District and State aforesaid, did then and there wilfully and unlawfully being then and there an itenerent vendor of drugs, nostrums and applications, for the cure of diseases, sell and hawk drugs ointments nostrums and applications intended for the cure of disease and treatment of disease and deformity, he being then and there an itinerant vendor of drugs, ointments, nostrums and applications intended for the treatment of disease and deformity, contrary to the form of the Statutes of the State of Louisiana, in such case made and provided and against the peace and dignity of the same.

(Signed) WILLIAM C. BARNETTE,
*District Attorney Third Judicial District Louisiana.*

(Endorsements:) No. 4232. State of Louisiana versus J. C. Baccus. Itinerant Vendor of Drugs. Information. William C. Barnette District Attorney Third District of Louisiana.
2 Witnesses; H. A. Sherman. Let the finding of this Bill be recorded; let process issue thereon, let the bail bond of the defendant be fixed at One Hundred dollars, and the Sheriff of the Parish of Claiborne or either of his legally authorized deputies be authorized to take and approve the same. Done and signed officially this the tenth day of July, 1911. (Signed) B. P. Edwards, Judge Third District, Louisiana. Filed July 12, 1911. E. H. Forston, Clerk D. C. Duly recorded on page 110, Book "2" Indictment records, July 12, 1911. (Signed) E. H. Forston, Clerk D. C.

3 (*Warrant.*)

STATE OF LOUISIANA,
*Parish of Claiborne:*

To the Sheriff of the Parish and State aforesaid, Greeting:

Whereas the Dist. Attorney in and for said Parish and State, chosen, elected and sworn, in and for said Parish and State did file a Bill of Information against J. C. Baccus for committing the crime being itinerant vendor of drugs in said Parish and State:

Now, therefore, in the name of the State of Louisiana, you are hereby commanded to arrest said J. C. Baccus and him safely detain and keep in the public of said Parish and State, to answer to said indictment, until discharged by due course of law, unless he give bond and security in the sum of one hundred dollars, conditioned according to law, for his appearance at the District Court, from time to time, and term to term, to answer said bill of indictment, or unless he be otherwise discharged by due course of law.

Witness the Honorable B. P. Edwards Judge of said Court, this 12 day of Jan. 1911.

(Signed) E. H. FORTSON,
*Clerk District Court.*

(Endorsed:) State vs. J. C. Baccus. Warrant. I have this day arrested the within named Def't and have released him on his approved bond. This 18th day of July 1911. (Signed) B. T. Collier, Sheriff. Filed and recorded July 18th, 1911 in Book "2" Indictment Records Claiborne Ph. page 102. (Signed) E. H. Fortson C. D. C.

4 *Motion to Quash.*

In Third Judicial District Court, Claiborne Parish, Louisiana.

No. 4232.

STATE OF LOUISIANA, P.,
vs.
J. C. BACCUS.

Now comes the defendant in the above numbered and entitled cause through counsel and moves the court to quash the Bill of Information filed against him herein upon the following grounds, or reasons, viz:—

1st. That Section 12, of Act No. 49, of 1894, does not state an offense therefore no Bill of Information can be based thereon.

2nd. That the Bill of Information does not set forth any offense known to the Laws of Louisiana.

3rd. That the sale of drugs &c. consisting of patent or proprietary drugs, &c. put up in sealed packages or bottles ready for use with printed directions around said packages and bottles, is not practicing medicine or violative of Section 12, of Act 49, of 1894.

4th. That Section 12, of Act 49 of 1894, is class legislation, because it allows all other persons to sell these articles except itinerant vendors and is in contravention of Arts. 2, 6, and 15, of the Constitution of the State of Louisiana, therefore said Section 12, is unconstitutional.

5th. That said Section 12, of Act 49, of 1894, is in contravention of Section 1 of the 14th Amendment to the United States Constitution as it (*a*) prevents a citizen from pursuing a lawful vocation; (*b*) it denies to other citizens rights enjoyed by all others in the state.

6th. It is class legislation in its effect, as it gives to the local dealer a monopoly in the sale of such drugs, &c. and deprives the itinerant vendor or dealer the privilege to sell such articles and is therefore contrary to the state constitution Arts. 2, 6 and 15, and Section 1, of 14th Amendment to the Constitution of the United States of America, and defendant specially pleads the said unconstitutionality of said Section 12, of Act. 49, of 1894.

Wherefore defendant prays that this his motion to quash be sustained, the bill of Information be quashed and he be discharged.

Defendant prays for all orders necessary in the premises and for general relief.

(Signed) RICHARDSON & RICHARDSON,
*Att'ys for Defendant.*

(Endorsements:) 3d D. C. No. 4232. State vs. J. C. Baccus. Motion to Quash. Filed Oct. 18, 1911. E. H. Fortson, C. L. D C.

6 (*Statement of Agreed Facts.*)

In Third Judicial District Court, Claiborne Parish, Louisiana.

No. 4232.

STATE OF LOUISIANA
vs.
J. C. BACCUS.

The following statements of facts are hereby agreed to viz; That the defendant was an itinerant vendor of drugs, nostrums, ointments, and applications for the cure of diseases, sell and hawk drugs and ointments, nostrums, and applications intended for the cure of diseases being then and there an itinerant vendor of drugs, ointments, nostrums and applications intended for the treatment of diseases.

It is also admitted that the said drugs, nostrums, ointment and applications intended for the cure of diseases, and treatment of diseases, for which defendant was an itinerant vendor, were compounded and prepared by the Rawleigh Medical Co. of the State of Illinois, and that said remedies, drugs, nostrums, ointments and applications were put up in sealed packages or bottles ready for use with printed directions on the packages or bottles and that defendant was an itinerant vendor of same in original packages and bottles and prepared by the proprietors.

It is also admitted that all persons except itinerant vendors have the right to sell said remedies, that is, patent and proprietary drugs, nostrums, ointments and applications, intended for the cure of diseases.

(Signed) WILLIAM C. BARNETTE, *Dist. Att'y.*
" RICHARDSON & RICHARDSON,
*Att'ys for Def't.*

(Endorsements:) 3rd D. C. No. 4232. State vs. J. C. Baccus. Statement of Agreed Facts. Filed in Evidence Oct. 18/1911. E. H. Fortson, C. D. C.

7 (*Bill of Exception No.* 1.)

In Third Judicial District Court, Claiborne Parish, Louisiana.

No. 4232.

STATE OF LOUISIANA
vs.
J. C. BACCUS.

Be it remembered that defendant having filed a motion to quash, the Bill *if* Information filed in this cause upon the grounds or reasons stated in the motion to quash, which is herein referred to and made a part hereof, having come on for trial, the Court over-ruled said motion to quash for the reasons viz:

(By the COURT:) The motion to quash is based upon the unconstitutionality of Section 12, of Act 49, of 1894; the Court briefly states that it was in doubt with reference to the constitutionality of Section 12, of Act 49, of 1894, and considering the fact that the Supreme Court of the State of Louisiana, was the proper and competent authority to pass upon the constitutionality of this question the Court overruled the motion to quash, for the above reasons.

To which ruling defendant excepted and tenders this his bill of Exception the same having been first submitted to opposing counsel and prays the same be allowed signed, filed and made a part of the record in this case.

Thus done and signed in open Court, on this October 26th, 1911.

(Signed) B. P. EDWARDS, *Judge.*

(Endorsements:) D. C. No. 4232. State vs. J. C. Baccus. Bill of Exception No. 1. Filed Oct. 26th, 1911. E. H. Fortson, C. D. C.

8 (*Bill of Exception No.* 2.)

In Third Judicial District Court, Claiborne Parish, Louisiana.

No. 4232.

STATE OF LOUISIANA
vs.
J. C. BACCUS.

Be it remembered that on the trial of this cause, the counsel for defendant, requested the Court to charge the Court if it found from the evidence that no other persons were prohibited by law except Itinerant Vendors to sell drigs, nostrums, ointment and applica-

tions of any kind intended for the treatment or cure of diseases, injury or deformity, as stated in Section 12, of Act 49, of 1894, then and in that case, it was the duty of the Court to find that said Section 12, was class legislation, and was therefore unconstitutional as it is in contravention of Arts. 2, 6, and 15, of the State Constitution and Section 1, of the 14th Amendment of the Constitution of the United States of America, and therefore acquit the defendant, which requested charge the Court refused to give for the following reasons, viz;

(By the COURT:) The ruling of the Court is based upon the reasons given in bill of Exception No. 1. There being no Jury in this case, but the case tried by the Court for the reasons assigned in bill of Exception No. 1, the Court gives here reasons for overruling and not considering the charge.

To which refusal defendant excepted and tenders this his Bill of Exception the same having been tendered the opposing counsel for examination, and prays that the same be allowed, filed and made a part of the record in this cause.

Thus done and signed in open Court, on this 26th day of October, 1911.

(Signed) B. P. EDWARDS,
*Judge 3d Dist. of La.*

(Endorsements:) 3d D. C. No. 4232. State vs. J. C. Baccus. Bill of Exception No. 2. Filed Oct. 26/1911. E. H. Fortson, C. D. C.

9 *(Motion for New Trial.)*

Third Judicial District Court, Claiborne Parish, Louisiana.

No. 4232.

STATE OF LOUISIANA, P.,
vs.
J. C. BACCUS.

Now comes defendant by counsel, and moves the Court to grant him a new trial in this case on the ground that the verdict of the Court, is contrary to the law and the evidence. The evidence in the case shows that defendant, was an itinerant vendor of patent and *preparatory* medicines, put up in Illinois, by The Rawleigh Medicine Co. and were sold in original packages or bottles, with directions thereon for their use &c. and therefore not violation of Section 12, Act 49, of 1894, and that all other persons except Itinerant Vendors are not prohibited from selling same, therefore class legislation and in contravention of Arts. 2, 6, and 15 of the Constitution of the State of Louisiana, and Section 1 of the 14th Amendment to the Constitution, of the United States of America, the statement of facts is made a part hereof.

Wherefore defendant prays that a new trial be granted him for all orders necessary in the premises and for general relief.

(Signed) RICHARDSON & RICHARDSON,
*Att'ys for Defendant.*

(Endorsements:) 3d D. C. No. 4232. State vs. J. C. Baccus. Motion for New trial. Filed Oct. 20/1911. E. H. Fortson, C. D. C.

10 (*Bill of Exception No. 3.*)

In Third Judicial District Court, Claiborne Parish, Louisiana.

No. 4232.

STATE OF LOUISIANA
VS.
J. C. BACCUS.

Be it remembered that after the Court had rendered verdict finding the accused guilty, defendant filed a motion for a new trial, said motion is herein referred to and made a part hereof, the Court overruled the motion for the following reasons, viz:—

(By the COURT:) The Court refuses a new trial for the reasons previously assigned in Bills of Exception Nos. 1 and 2.

To which ruling defendant excepted and tenders this his bill of Exception, the same having been presented to opposing counsel, and prays that the same be allowed, signed, filed and made a part of the record in this cause.

Thus done and signed in open Court on this 26th day of October, 1911.

(Signed) B. P. EDWARDS,
*Judge 3rd Dist. of La.*

(Endorsements:) 3d D. C. No. 4232. State vs. J. C. Baccus. Bill of Exception No. 3. Filed Oct. 20th, 1911. E. H. Fortson, C. D. C.

11 *Minutes of Court.*

4232.

STATE OF LOUISIANA
VS.
J. C. BACCUS.

Information Filed July 12, 1911.

Itinerant Vendor of Drugs.

Oct. 18, 1911. Motion to Quash Bill of Information filed.
Agreed statement of facts filed.
Motion to be tried on statement of facts filed.

Oct. 20, 1911. Motion to Quash bill of Information tried and overruled. Bill of Exceptions filed by defendant.
Def't in open Court, waives arraignment and pleads not guilty.
Case called and both parties announced ready.
Case submitted on agreement of facts filed—marked def't A. for Identification.
Judgment of the court that the defendant is guilty as charged in Bill of Information.
Sentence of the court that defendant pay a fine of $100.00 and all costs and in default of payment of said fine and costs that he be incarcerated in the parish jail of Claiborne Parish, for period of sixty days and work on the public work of the parish.
Motion for new trial filed.
Motion for new trial and new trial denied.
Motion in arrest of judgment filed.
Motion tried and overruled by the Court.
Bill of Exceptions No. 4, filed to said ruling of the Court.
Counsel for def't gives notice to the Court and District Att'y that def't will apply to the Supreme Court of Louisiana, for writs of Certiorari and prohibition.

(Signed) B. P. EDWARDS, *Judge.*

12 (*Motion in Arrest.*)

In Third Judicial District Court, Claiborne Parish, La.

No. 4232.

STATE OF LOUISIANA
vs.
J. C. BACCUS.

Now comes defendant in the above numbered and entitled cause through counsel and after verdict and before sentence, and moves the Court to arrest judgment herein and not pronounce the same because of manifest errors in the record, to wit:—for the reasons given and stated in the motion to quash and the evidence taken in said motion to quash, all of which is hereby referred to and made a part of this motion in arrest and because no judgment or sentence against this defendant can be lawfully rendered on said record.

Wherefore he prays that this motion in arrest be sustained and defendant discharged and his bond cancelled.

Defendant prays for all orders necessary in the premises, for costs and general relief.

RICHARDSON & RICHARDSON,
*Att'ys for Defendant.*

(Endorsements:) 3 D. C. No. 4232. State of Louisiana, vs. J. C. Baccus. Motion in arrest. Filed Oct. 20th, 1911. (Signed) E. H. Fortson, C. D. C.

13 (*Bill of Exception No. 4.*)

In Third Judicial District Court, Claiborne Parish, Louisiana.

No. 4232.

STATE OF LOUISIANA
vs.
J. C. BACCUS.

Be it remembered that after the trial of the above cause on the merits and verdict of the Court being rendered and before sentence, defendant by counsel filed a motion in arrest of judgment which is hereby referred to and made a part here*by*, which the Court overruled upon or for the following reasons, viz:—

(By the COURT:) For reasons heretofore given in the motion to Quash and other Bills of Exception, the Court refused to arrest judgment.

To which ruling defendant by counsel excepted and tenders this his bill of exception, the same being tendered the opposing counsel, prays the Court that the same be allowed, signed, filed and made a part of the record.

Thus done and signed in Open Court, on this Oct. 26th, 1911.

(Signed) B. P. EDWARDS,
*Judge 3rd Dist. of La.*

(Endorsements:) 3d D. C. No. 4232. State vs. J. C. Baccus. Bill No. 4. Filed Oct. 26th, 1911. (Signed) E. H. Fortson, C. D. C.

14 Under the law of the State *of our State* it is not required that this application be filed in my office, but I annex a copy of same handed me by Att'ys for defendant.

E. H. FORTSON, *C. D. C.*

To the Honorable the Supreme Court of the State of Louisiana:

The petition of the State of Louisiana on the Relation of J. C. Baccus, a resident of Claiborne Parish, Louisiana, respectfully represents to the Honorable Court that the District Attorney for the Third Judicial District Court in and for Claiborne Parish, La., on the 12th day of July, 1911, filed in the Third Judicial District Court for said Parish and State, a Bill of Information against Relator charging him with the crime or misdemeanor as an "Itinerant Vendor of Drugs", see copy of Bill of Information hereto annexed and made a part of this application and marked Exhibit "A."

He shows that he was arrested by the Sheriff by virtue of a warrant issued on said Bill of Information, that before he plead to said Bill of Information, he filed a motion to quash the bill on several

grounds, see copy of motion to quash hereto annexed and marked Exhibit "B", that on the trial of the motion to quash an agreed statement of facts was signed by the District Attorney and counsel for defendant and filed in evidence, see copy of facts hereto annexed and marked Exhibit "C." That the Court overruled said Motion to Quash, to said ruling, Relator excepted, a bill duly signed and filed by the Court, see copy of said Bill of Exceptions hereto annexed and marked exhibit "D", that Relator then on the case being called, waived arraignment and plead not guilty, the statement of facts marked Exhibit "C" was filed as evidence on the merits. The Attorneys for Relator then requested the Court to charge the Court the contentions of defendant, what was the law under the evidence which the Court refused to charge and Relator excepted, all of which will be shown by copy of Bill of Exceptions hereto annexed and marked Exhibit "E", the Court thereon found the Re-
15 lator guilty as charged. Relator then filed a motion for a new trial, see copy of motion for a new trial, hereto annexed and marked Exhibit "F." The Court overruled the motion for a new trial, Relator excepted, a copy of Bill of Exception to said ruling hereto annexed and marked Exhibit "G", thereon Relator filed a motion in Arrest, copy of Motion in arrest is hereto annexed and marked Exhibit "H", the Court overruled said Motion in Arrest and Relator excepted, copy of said Bill of Exception to said ruling of his motion in arrest is hereto annexed and marked Exhibit "I", the Court thereon sentenced Relator that he pay a fine of $100.00 and all costs and in default of payment of said fine and costs, that he be incarcerated in the Parish jail of Claiborne Parish for the Period of Sixty days and work on the public works of the Parish.

Relator alleges that the lower Court arbitrarily and illegally overruled his Motion to Quash the Bill of Information filed by him, that the said Motion is correct and was based on legal grounds and should have been sustained, the Bill quashed and Relator discharged. The charge requested as stated in Exhibit "C" should have been given as the same was legal and relevant to the facts proven, see statement of facts filed Exhibit "C", that the Court erred in not granting Relator a new trial, that the verdict was contrary to the law and the evidence, see Exhibit "C", that the Court also erred in not arresting the judgment, see Exhibit "H" and that the sentence of the Court was illegal and arbitrary and that all ruling-, proceedings and acts done by the lower Court in this cause as is shown by the Exhibits annexed hereto and was done to the prejudice of Relator and that justice has been denied him, that from said cause there lies no appeal and the only relief left to Relator is ti apply to your Honorable Court for the Writs provided by law, Certiorari and prohibition, Art. 94 of the Constitution of 1898.

Relator shows the Court that he has notified the Judge of the District Court, Hon. B. P. Edwards and the Counsel for the opposite party, the Hon. W. C. Barnette, District Attorney for 3rd District of Louisiana, that he would apply for said Writs of Certiorari and Prohibition.

16 Wherefore your Relator prays that a Writ of Certiorari issue, commanding the Hon. B. P. Edwards, Judge of said Court to send up to this Court a certified copy of all proceedings had in said cause of State vs. J. C. Baccus, No. 4232, Third District Court, Claiborne Parish, Louisiana hereinbefore mentioned and that upon due hearing, a Writ of Prohibition issue prohibiting said Judge from enforcing the judgment and sentence against defendant, that judgment and sentence be annulled, reversed and set aside, that Relator be discharged and his bond cancelled.

Relator prays for all orders necessary and general relief.

RICHARDSON & RICHARDSON,
*Att'ys for Relator.*

STATE OF LOUISIANA,
*Parish of Claiborne:*

Personally came and appeared before me the undersigned authority, J. C. Baccus, who on oath deposes and states that, he is the Relator herein and that all the allegations, averments and facts set forth in the above and foregoing petition are true and correct.

(Signed) J. C. BACCUS.

Sworn to and subscribed before me, this October 28th, 1911.

(Signed) E. H. FORTSON,
*Clerk Third Dist. Court.*

17 UNITED STATES OF AMERICA,
*State of Louisiana:*

Supreme Court of the State of Louisiana.

NEW ORLEANS, SATURDAY, *November 4th*, 1911.

The Court was duly opened, pursuant to adjournment.

Present:

Their Honors Joseph A. Breaux, Chief Justice; Frank A. Monroe, Oliver O. Provosty, Alfred D. Land, Associate Justices.

Absent: Walter B. Somerville.

His Honor Mr. Justice Provosty, Pronounced the opinion and judgment of the Court in the following Case:

SATURDAY, *November 4th*, 1911.

No. 19133.

STATE OF LOUISIANA
vs.
J. C. BACCUS.

Mr. Justice PROVOSTY:

In Re J. C. Baccus, applying for writs of Certiorari, and Prohibition

The within application is refused.

A true copy.
Clerk's office, New Orleans, December 29th, 1911.
(Signed) PAUL E. MORTIMER, *Clerk.*

(Endorsed:) No. 19,133. Supreme Court of the State of Louisiana. State of Louisiana vs. J. C. Baccus. In re J. C. Baccus, Applying for Writs of Certiorari and Prohibition. No. —. Certified copy of opinion and judgment. Deposit $—. Amount of costs $10.00.

18 Ex. J.

In the Third Judicial District Court, Claiborne Parish, Louisiana, *ss.*

I, E. H. Fortson, clerk of said court, hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of the State of Louisiana vs. J. C. Baccus, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Homer, Louisiana, this 4th day of Jan'y, A. D. 1912.

[Seal of the Clerk of the Parish of Claiborne, State of Louisiana. Union, Justice & Confidence.]

[SEAL.] E. H. FORTSON,
*Clerk Third Judicial District Court.*

19 K.†

In the Third Judicial District Court, Claiborne Parish, Louisiana.

No. 4232.

STATE OF LOUISIANA
vs.
J. C. BACCUS, Defendant.

*Petition for Writ of Error, Assignment and Prayer.*

Considering himself aggrieved by the final decision of the Third Judicial District Court, Claiborne Parish, Louisiana, in rendering judgment against the defendant in the above entitled cause, and having applied in accordance with the constitution and laws of the State of Louisiana to the Supreme Court of that state by petition for a writ of certiorari and prohibition to review said judgment, which writ was denied in the following words, "The application for writs of certiorari and prohibition denied.", whereby the defendant is precluded from securing a review of said judgment in the Supreme

[† In pencil in copy.]

Court or any other court of Louisiana, the defendant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of the supersedeas bond.

And the said J. C. Baccus assigns the following errors in the records and proceedings of the said cause:

The Third Judicial District Court, Claiborne Parish, Louisiana erred in holding and deciding that Section 12 of Act 49 of 1894 of Louisiana was valid. The validity of said section was denied and drawn in question by the defendant, J. C. Baccus on the ground of its being repugnant to the constitution of the United States and in contravention thereof.

20 The said errors are more particularly set forth as follows:

The said Third Judicial District Court, Claiborne Parish, Louisiana erred in holding and deciding

First, that said section 12 did not abridge the privileges or immunities of citizens of the United States or of this defendant as guaranteed by the fourteenth amendment to the federal constitution.

Second, that said section 12 did not deprive this defendant of life, liberty or property without due process of law in contravention of the fourteenth amendment of the federal constitution.

Third, that said section 12 did not deny to this defendant (being a person within the jurisdiction of the laws of the State of Louisiana) the equal protection of the laws as guaranteed by the fourteenth amendment to the federal constitution.

For which errors the defendant J. C. Baccus prays that the said judgment of the Third Judicial District Court, Claiborne Parish, Louisiana dated the — day of November, A. D. 1911, be reversed and a judgment rendered in favor of the defendant and for costs

JAS. A. RICHARDSON,
JNO. S. RICHARDSON,
*Attorneys for Defendant.*

——— ———,
*Of Counsel.*

In the Third Judicial District Court, Claiborne Parish, Louisiana, ss.

Let the writ of error issue upon the execution of a bond by J. C. Baccus to the State of Louisiana in the sum of Five Hundred (500.00) Dollars; such bond when approved to act as a supersedeas.

B. P. EDWARDS,
*Judge of the Third Judicial District Court, Claiborne Parish, Louisiana.*

This Court consists of one Judge only.

Dated the 27th day of November 1911.

21 *(Bond.)*

J. C. BACCUS, Plaintiff in Error,
vs.
STATE OF LOUISIANA, Defendant in Error.

Bond.

Know all men by these presents, That we J. C. Baccus as principal and C. Q. Hollenshead and Walter H. Jarrell as sureties, are held and firmly bound unto the State of Louisiana in the sum of Five Hundred Dollars, to be paid to the said State to which payment well and truly to be made we bind ourselves severally, firmly by these presents.

Sealed with our seals and dated this 5th day of Dec'r A. D. 1911.

Whereas, the above named plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Third Judicial District Court, Claiborne Parish, Louisiana.

Now, therefore, the condition of this application is such that if the above named plaintiff in error shall prosecute his said writ of eror to effect and answer all costs that may be adjudged if he shall fail to make good his plea then this application to be void, otherwise to remain in full force and effect.

(Signed) J. C. BACCUS.
" C. Q. HOLLENSHEAD.
" W. H. JARRELL.

22 STATE OF LOUISIANA,
*Parish of Claiborne, ss:*

C. Q. Hollenshead and Walter H. Jarrell, being each duly sworn on oath, deposes and say we are each of lawful age and are citizens of the State of Louisiana, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Two Hundred & Fifty Dollars over and above all debts, liabilities and exemptions.

(Signed) C. Q. HOLLENSHEAD.
" W. H. JARRELL.

Subscribed and sworn to before me this 5th day of Dec'r 1911.

(Signed) E. H. FORTSON,
*Clerk Third Judicial District Court,*
*Claiborne Parish, La.*

Bond approved, and to operate as a supersedeas.

(Signed) B. P. EDWARDS,
*Judge of the Third Judicial District Court,*
*Claiborne Parish, Louisiana.*

This Court Consists of one Judge only.

(Endorsed:) #4232. State of Louisiana vs. J. C. Baccus. Bond. Filed Dec. 5th, 1911. (Signed) E. H. Fortson, C. D. C.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Third Judicial District Court of the State of La., for the —— District of ——, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Third Judicial District Court of Louisiana, Parish of Claiborne, being the highest Court of law of the said *Court* in which a division could be had in the said suit before you, between the State of Louisiana, against J. C. Baccus, wherein was drawn in question the validity of a Statute of said State of Louisiana, on the ground of its being repugnant to the Constitution of the United States, and in contravention of Section 1 of 14th Amendment to the Federal Constitution, and the decision of the said State Court was against the right specially set up by said J. C. Baccus, defendant, a manifest error hath happened to the great damage of the said J. C. Baccus, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, D. C., within 30 days from date hereof, in the United States Supreme Court, to be then and there held, and the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 22nd day of December in the year of our Lord one thousand nine hundred and Eleven.

[Seal U. S. Circuit Court of the Western Dist. of La.]

LEROY P. ENLOTTA,
*Clerk of the U. S. Circuit Court, Western District of Louisiana.*

Allowed by

B. P. EDWARDS,
*Judge Third Judicial District Court, Parish of Claiborne, State of Louisiana.*

[Endorsed:] No. 4232. United States Circuit Court, Western District of Louisiana. State of Louisiana vs. J. C. Baccus. Writ of Error. Filed this Dec. 29/1911. E. H. Fortson, C. D. C.

24 O.†

*Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Louisiana, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof pursuant to a writ of error filed in the office of the clerk of the Third Judicial District Court, Claiborne Parish, Louisiana, wherein J. C. Baccus is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the judge of the Third judicial District Court, Claiborne Parish, Louisiana, this 2nd day of January, 1912.

B. P. EDWARDS,
*Judge of the Third Judicial District Court,*
*Claiborne Parish, Louisiana.*

This Court consists of one Judge only.
Attest:

[SEAL.] E. H. FORTSON,
*Clerk Third Judicial District Court,*
*Claiborne Parish, Louisiana.*

ARCADIA, LOUISIANA, *Jan. 2nd,* 1912.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

WILLIAM C. BARNETTE,
*Attorney for the State of Louisiana.*

25 N.†

*Certificate of Lodgment.*

Third Judicial District Court, Claiborne Parish, Louisiana, *ss.*

I, E. H. Fortson, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk, on the 29th day of Dec'r, 1911, in the matter of the State of Louisiana, vs. J. C. Baccus, defendant.

1. The original bond, of which a copy is herein set forth;
2. Two copies of the writ of error, as herein set forth, one for the defendant in error, and one to file in my office.

---

[† In pencil in copy.]

3. One copy of the petition, assignment of errors, and prayer as herein set forth, to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Homer, Louisiana, this 4th day of Jan'y, 1912.

[Seal of the Clerk of the Parish of Claiborne, State of Louisiana. Union, Justice & Confidence.]

[SEAL.]

E. H. FORTSON,
*Clerk Third Judicial District Court,*
*Claiborne Parish, Louisiana.*

26 *Return to Writ.*

UNITED STATES OF AMERICA,
*Third Judicial District Court,*
*Claiborne Parish, Louisiana, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Third Judicial District Court Claiborne Parish, Louisiana, in the City of Homer, Louisiana, this the 13th day of January, 1912.

[Seal of the Clerk of the Parish of Claiborne, State of Louisiana. Union, Justice & Confidence.]

[SEAL.]

E. H. FORTSON,
*Clerk Third Judicial District Court,*
*Claiborne Parish, Louisiana.*

*Costs.*

| | |
|---|---|
| Paid to the Clerk of the United States Court..... | $4.55 |
| Paid to the clerk of Third Judicial District Court, Claiborne Parish, Louisiana, for making transcript..... | 15.00 |
| Total ..... | $19.55 |

Endorsed on cover: File No. 23,022. Louisiana, Parish of Claiborne, 3d Judicial District Court. Term No. 524. J. C. Baccus, plaintiff in error, vs. The State of Louisiana. Filed January 23d, 1912. File No. 23,022.

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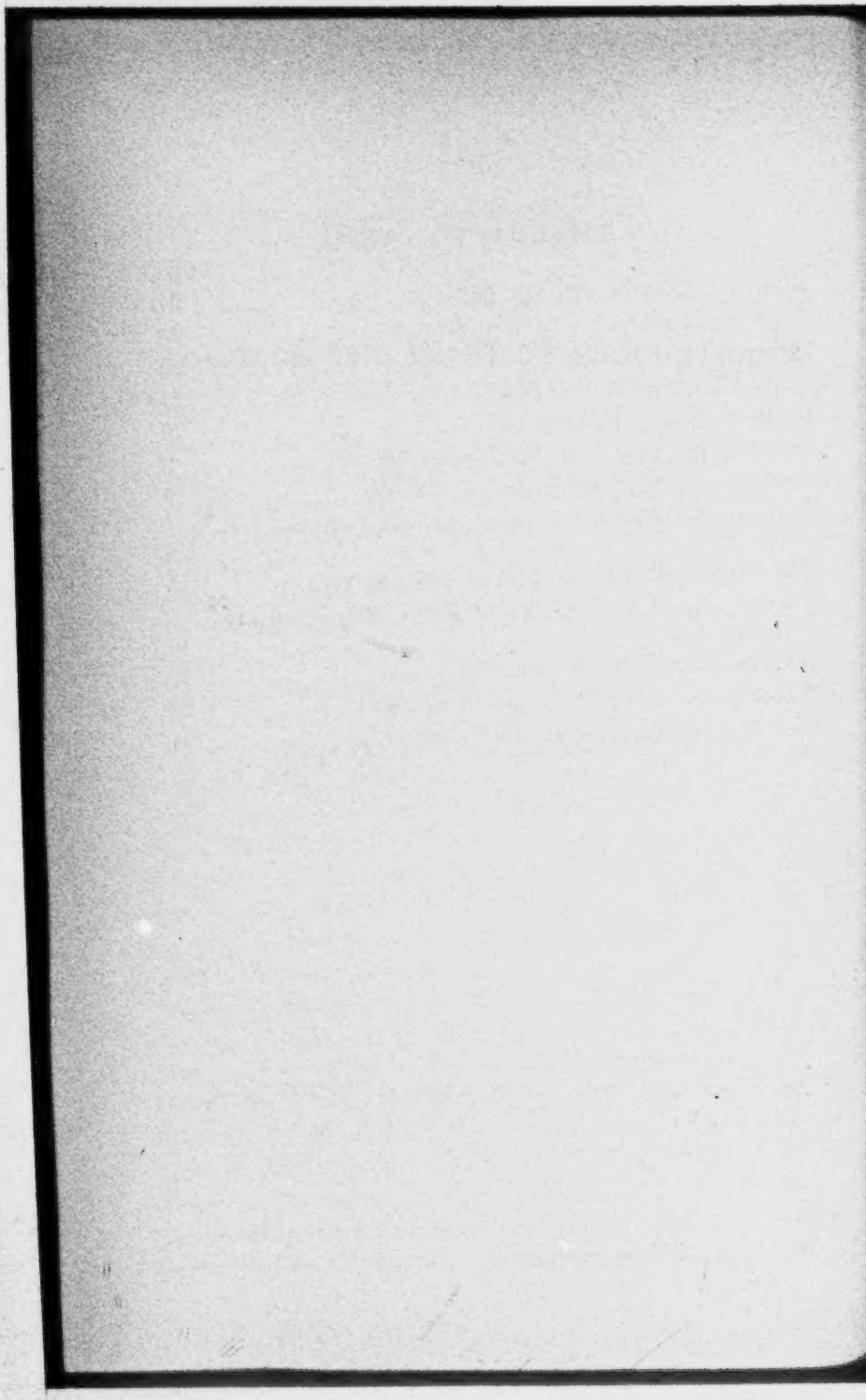

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

No. 170.

J. C. BACCUS, *Plaintiff in Error,*

vs.

THE STATE OF LOUISIANA, *Defendant in Error.*

IN ERROR TO THE THIRD JUDICIAL DISTRICT, PARISH OF CLAIBORNE, STATE OF LOUISIANA.

## Brief and Argument of Plaintiff in Error.

### I.

### STATEMENT OF CASE.

The plaintiff in error in the above entitled cause in July, 1911, was charged by bill of information in the Third Judicial District Court of Claiborne Parish, Louisiana, with having violated Section 12 of Act 49, Laws of Louisiana, which reads as follows:

> "That any itinerant vendor of any drug, nostrum, ointment, or application of any kind, intended for the treatment of disease or injury, or who may by writing, print or other methods profess to cure or treat disease or deformity

by any drug, nostrum, manipulation or other expedient, in this state, shall, if found guilty, be fined in any sum not less than $25 and not exceeding $100 for each offense, to be recovered in an action of debt, before any court of competent jurisdiction, or shall be imprisoned for a term of not less than ten days or more than thirty days, or be both fined and imprisoned."

The information which was filed against him charged that "he did then and there wilfully and unlawfully, being then and there an itinerant vendor of drugs, nostrums and applications for the cure of disease, sell and hawk drugs, ointments, nostrums and applications intended for the cure of disease and treatment of disease and deformity, he being then and there an itinerant vendor of drugs, ointments, nostrums and applications intended for the treatment of disease and deformity, contrary to the form of the Statutes of the State of Louisiana, in such case made and provided and against the peace and dignity of the same." (Rec., 1.)

At the October term of said court, 1911, plaintiff in error by his counsel moved to quash the bill of information filed against him as aforesaid upon the following grounds or reasons, to-wit:

*First.* That Section 12 of Act No. 49 of 1894 does not state an offense, therefore no bill of information can be based thereon.

*Second.* That the bill of information does not set forth any offense known to the laws of Louisiana.

*Third.* That the sale of drugs, etc., consisting of patent or proprietary drugs, etc., put up in sealed packages or bottles ready for use with printed directions around such packages and bottles, is not practicing medicine or violative of Section 12 of Act 49 of 1894.

*Fourth.* That Section 12 of Act 49 of 1894 is class legislation, because it allows all other persons to sell these articles except itinerant vendors and is in contravention of Arts. 2, 6 and 15 of the Constitution of the State of Louisiana, therefore said Section 12 is unconstitutional.

*Fifth.* That said Section 12 of Act 49 of 1894 is in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution, as it (a) prevents a citizen from pursuing a lawful vocation; (b) it denies to other citizens rights enjoyed by all others in the state.

*Sixth.* It is class legislation in its effect, as it gives to the local dealer a monopoly in the sale of such drugs, etc., and deprives the itinerant vendor or dealer the privilege to sell such articles, and is therefore contrary to the state Constitution, Arts. 2, 6 and 15, and Section 1 of Fourteenth Amendment to the Constitution of the United States of America, and defendant specially pleads the said unconstitutionality of said Section 12 of Act 49 of 1894.

Wherefore defendant prays that this his motion to quash be sustained, the bill of information be quashed and he be discharged.

Defendant prays for all orders necessary in the premises and for general relief." (Rec., 2 and 3.)

By agrement of counsel representing the State of Louisiana and counsel for the defendant in error, the cause was submitted to the court for decision on the following agreed statement of facts:

"That the defendant was an itinerant vendor of drugs, nostrums, ointments and applications for the cure of diseases, sell and hawk drugs and ointments, nostrums and applications intended for the cure of diseases being then and there an itinerant vendor of drugs, ointments,

nostrums and applications intended for the treatment of diseases.

It is also admitted that the said drugs, nostrums, ointments and applications intended for the cure of diseases and treatment of diseases, for which the defendant was an itinerant vendor, were compounded and prepared by the Rawleigh Medical Company of the State of Illinois, and that said remedies, drugs, nostrums, ointments and applications were put up in sealed packages or bottles ready for use, with printed directions on the packages or bottles, and that defendant was an itinerant vendor of same in original packages and bottles and prepared by the proprietors.

It is also admitted that all persons except itinerant vendors have the right to sell said remedies, that is, patent and proprietary drugs, nostrums, ointments and applications intended for the cure of diseases." (Rec., 3.)

Upon this agreed statement of facts the court found the plaintiff in error guilty and entered the following order:

> "Sentence of the court that defendant pay a fine of $100 and all costs, and in default of payment of said fine and costs that he be incarcerated in the parish jail of Claiborne Parish for a period of sixty days and work on the public work of the parish." (Rec., 7.)

On the finding of the defendant guilty under the above agreed statement of facts the plaintiff in error moved for a new trial, which was duly overruled by the court, and after the court had entered the judgment above set forth the plaintiff in error also moved the court in arrest of judgment because of manifest errors in the record, which motion was also overruled by the court. (Rec., 6, 7 and 8.)

To all the rulings of said court the plaintiff in error objected in proper manner and in apt time and tendered his bill of exceptions as the law provides.

The plaintiff in error thereupon notified the court, the Honorable B. P. Edwards, and the counsel for the opposite party, William C. Barnette, District Attorney for the Third Judicial District of Louisiana, that he would, under the law, apply to the Supreme Court of the state for writs of certiorari and prohibition, which he accordingly did.

Upon the filing of the petition for the writs of certiorari and prohibition above mentioned in the Supreme Court, the following order refusing the same was entered, to-wit:

"SUPREME COURT OF THE STATE OF LOUISIANA.

No. 19,133.

State of Louisiana
*vs.*
J. C. Baccus.

Mr. Justice PROVOSTY:

*In re* J. C. Baccus, applying for writs of certiorari and prohibition.

The within application is refused.

A true copy.

Clerk's office, New Orleans, December 29, 1911.

(Signed) PAUL E. MORTIMER, *Clerk.*"

(Rec., 10 and 11.)

The plaintiff in error shows the court that under the constitution and laws of the State of Louisiana, the said District Court in which the case was tried has unlimited and exclusive original jurisdic-

tion in this case, and as there could be no appeal from the decision of the said court in finding him guilty and fixing a punishment as heretofore set out, and as the Supreme Court of the State of Louisiana refused to review the case when brought before it on writ of certiorari and prohibition as above recited, the action of said District Court in this behalf is final and conclusive in this case. (Constitution of the State of Louisiana, Arts. 85, 94, 109, 133.) (See Appendix B.)

In order to have this final judgment reviewed the plaintiff in error applied to the Honorable B. P. Edwards, presiding judge of the Third Judicial District Court, Claiborne Parish, Louisiana, which court consists of only one judge, and who presided at the hearing of said cause, for writ of error from the said decision and judgment to the United States Supreme Court, which writ of error was duly granted by said court, whereupon the plaintiff in error made application to the United States Circuit Court for the Western District of Louisiana, who issued the writ of error in accordance to the law, which brings the case before this Honorable Court for review. (Rec., 11, 12, 13, 14.)

## II.

## SPECIFICATION OF ERRORS RELIED UPON.

The plaintiff in error claims there is manifest error on the face of the record in the following particulars, to-wit:

The Third Judicial District Court of Claiborne Parish, Louisiana, erred in holding and deciding:

**First:**

That Section 12 of Act 49, Louisiana Laws, did not abridge the privileges or immunities of citizens of the United States, or of this defendant, as guaranteed by the Fourteenth Amendment to the Federal Constitution.

**Second:**

That said Section 12 did not deprive this defendant of life, liberty or property without due process of law in contravention of the Fourteenth Amendment to the Federal Constitution.

**Third:**

That said Section 12 did not deny to this defendant, being a person within the jurisdiction of the laws of the State of Louisiana, the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution.

**Fourth:**

The court erred in not holding and deciding that said Section 12 does not state an offense; that said bill of information does not set forth any offense known to the laws of Louisiana; and that said Section is class legislation in that it gives the local dealers a monopoly in the sale of proprietary medicines, all of which is in contravention of Article 1 of the Fourteenth Amendment to the United States Constitution.

## III.

## BRIEF AND ARGUMENT.

The statute which the plaintiff in error was found to have violated is Section 12 of Act 49 of the Legislative Acts of Louisiana for the year 1894 (Appendix A). The title of the act may be given as follows:

> "To regulate the practice of medicine * * * and to prevent the practice * * * by unauthorized persons * * *."

Section 12 reads:

> "That any itinerant vendor of any drug, nostrum, ointment or application of any kind, intended for the treatment of disease or injury, or who may, by writing, print or other methods, profess to cure or treat disease or deformity by any drug, nostrum, manipulation or other expedient, in this state, shall, if found guilty, be fined in any sum not less than twenty-five (25) dollars and not exceeding one hundred (100) dollars for each offense, to be recovered in an action of debt before any court of competent jurisdiction, or shall be imprisoned for a term of not less than ten (10) days or more than thirty (30) days, or be both fined and imprisoned."

**First:**

### The Statute as Interpreted by the Courts of Louisiana.

There is a sharp conflict between the construction of this section by the Supreme Court when the act was before it and that of the District Court of the

state in the case at bar. While the act seems equally objectionable under either construction, it is proper, at the outset, to point out the distinction.

The above provision has been more than once considered by the Supreme Court of Louisiana. We refer to the cases of *State ex rel. Dist. Atty.* v. *Judge*, 105-371; *State ex rel. Wynne* v. *Judge*, 106-400; *State ex rel. Pettigrens et al.* v. *Hall, Judge*, 109-290 and 132. We particularly desire to call attention to the holding of the court in the case of *State ex rel. Wynne* v. *Lee, supra*, decided at the October, 1901-2, term of the court.

The act in its entirety was analyzed, and in construing Section 12 it was held (page 405):

> "A careful consideration of Section 12 of the act of 1894 leads, as we think, to the conclusion that it was not intended to apply to the itinerant vendor merely in his capacity of vendor, but that the lawmaker was undertaking to deal with him for the purposes of the act as a person professing to treat or cure disease or deformity by the use of drugs and nostrums which he sells, or by manipulation or other expedients."

The information filed in that case, after charging the selling by an itinerant vendor, further charged the defendant

> "* * * did, then and there, profess to cure and treat disease * * ." (page 401.)

So it is apparent that a violation of Section 12, as construed by the Supreme Court o Louisiana, can be claimed only when the sale is made by an itinerant vendor who professed to cure disease.

**Second:**

**The Statute as Construed in the Case at Bar.**

In the present proceeding the information does not charge plaintiff in error with "professing to cure disease." (Rec., 1.) The agreed facts upon which the conviction was based contain no statement that plaintiff in error made any such profession. (Rec., 3.) The second allegation of the motion to quash is:

> "That the bill of information does not set forth any offense known to the laws of Louisiana." (Rec., 2.)

So that when the plaintiff in error was found guilty, he necessarily was held to have violated the statute by selling drugs as an itinerant vendor "merely in his capacity of vendor," an act which the Supreme Court of Louisiana distinctly said, in the Lee case, was not a violation of the statute.

No appeal was allowed from this judgment by the laws of Louisiana. The Supreme Court of that state refused to review the judgment, thereby adopting it and making it the final adjudication by the judicial department of the state; and the conclusion seems irresistible that the validity of the statute must be determined by this court as it has been construed, interpreted and applied by the District Court in this particular case.

This court will not ordinarily entertain objections made to the manner of enforcing a valid state statute, but unless the rule we here contend for as to the construction of this statute is sound, every provision guaranteeing due process and equal protec-

tion might be arbitrarily disregarded by state tribunals and citizens thus deprived of the constitutional guaranties be left without remedy.

*Ex parte* Virginia, 100 U. S. 347.
*Hovey* v. *Elliott*, 167 U. S. 409.
*Scott* v. *McNeal*, 154 U. S. 34.
*Chicago, Burlington R. R. Co.* v. *Chicago*, 166 U. S. 226.
*Yick Wo* v. *Hopkins*, 118 U. S. 356.

**Third:**

**Can Section 12 of the Act Be Sustained if Interpreted to Prohibit the mere selling of Drugs by an Itinerant While Permitting Such Selling by all Others?**

The agreed facts (Rec., 3) state:

> "It is also admitted that all persons except itinerant vendors have the right to sell said remedies, that is, patent and proprietary drugs, nostrums, ointments and applications, intended for the cure of diseases."

The selling and distribution of drugs is a proper subject for regulation. They may be classed by themselves and be the subject of special regulations. So also peddlers may be licensed, regulated and controlled, but a statute which makes no attempt to protect the public by defining what drugs may be put upon the market nor defining the qualifications to be possessed by those authorized to sell and distribute such drugs, and which merely prohibits itinerant vending, neither protects the public health

nor morals and is an arbitrary classification of persons, which violates the Fourteenth Amendment.

*People* v. *Wilson*, 249 Ill. 195.

*Commonwealth Kentucky* v. *Payne Medicine Co.*, 138 Ky. 164.

*State* v. *Donaldson*, 41 Minn. 74.

In the case of the *People* v. *Wilson, supra,* the court had under consideration Section 12 of the Medical Practice Act of Illinois on itinerant vendors, which reads exactly like the Louisiana statute we are considering, except that the word "or" is omitted between the words "injury" and "who."

In considering this section the court said:

> "We think that a valid statute *cannot* be passed which accomplishes by indirection what is held in that case (*People* v. *Noel,* 187 Ill. 587) could not be accomplished directly, that is, instead of providing in direct terms by a statute that no person other than a druggist shall vend patent or proprietary medicines, passes a statute which imposes so high a license fee for the vending of patent and proprietary medicines that no itinerant vendor can afford to take out a license, the practical operation of which would be to give the druggists of the state a monopoly of that business."

It was also decided in the case of the *State* v. *Donaldson, supra,* where the court had under consideration the pharmacy laws of Minnesota, that:

> "It is a matter of common knowledge that what are called patent or proprietary medicines are prepared ready for immediate use by the public, put up in packages or bottles, labeled with the name, and accompanied with wrappers containing directions for their use. * * * There is nothing that calls into use any skill

> or science on the part of one who sells them; one man can do it just as well as another. * * * The fact that the seller is a pharmacist of itself furnishes no protection to the public. * * * Merely to limit their sale to pharmacists would furnish no protection to the public without some further regulation as to the inspection or analysis. * * * A statute merely limiting the sale of patent medicines to a particular class would not and could not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of the state."

The Supreme Court of the State of Kentucky in the case of *Commonwealth* v. *Payne Medicine Company, supra,* in considering a statute of that state regulating the sale of proprietary medicines, held:

> "We think that it is clear that the statute under consideration was not enacted under the police power of the state, and that the Legislature did not have in mind either the regulation or control of persons engaged in the sale of medicines. If control or regulation was the purpose of the legislation then it would have provided for the control and regulation of all persons who sell patent medicines in any quantity. There would be little accomplished in the way of regulation or control if only one class of persons were controlled and another class engaged in the same business left free to do as they pleased."

What was said by the courts in the foregoing quotations can be as well said of the statute we are considering in the case at bar. What good would it do to prohibit the sale of proprietary medicines by

itinerant vendors if every local merchant in the State of Louisiana was permitted to sell the same remedies without any control or regulation whatever?

**Fourth:**

**The Enforcement of the Statute Would Unwarrantably Deprive Plaintiff in Error of Liberty?**

The liberty guaranteed by the Fourteenth Amendment was by this court said to mean:

> "* * * Not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."
>
> *Allgeyer* v. *Louisiana*, 165 U. S. 578 (p. 589).
>
> *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746.
>
> *Lochner* v. *New York*, 198 U. S. 45.
>
> *In re* Jacobs, 98 N. Y. 98.

It was said by Mr. Justice BRADLEY in the case of *Butchers Union Company* v. *Crescent City Company*, *supra*, that:

> "The right to follow any of the common occupations is an unalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence,

which commences with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and pursuit of happiness.' This right is a large ingredient in the civil property of the citizen."

In the case of *In re* Jacobs, *supra*, in discussing Article 1 of the Fourteenth Amendment, which guarantees to every citizen the equal protection of the laws, the court said:

> "One may be deprived of his liberty and his constitutional right thereto molested without the actual restraint of his person. Liberty in its broadest sense as understood in this country means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any *lawful calling*, and to pursue any *lawful trade* or vocation."

**Fifth:**

**The Business and Occupation Attempted to Be Prohibited Is Lawful**

The selling of patent or proprietary medicine is a lawful occupation. Indeed it is so treated by the statute of Louisiana, and by the courts of that state. Thus in the Lee case the Supreme Court held that the mere selling of a drug, even by an "itinerant vendor," in the absence of a profession to cure, did not violate the statute, while in the agreed facts in this case it is said that all except "itinerant vendors" may lawfully sell. Under neither construction, therefore, does the offense con-

sist in selling, distributing or putting off the drug, but under one consists in the selling by an "itinerant vendor," and under the other by an itinerant vendor *who professes to cure disease*, but, under both of these constructions, the sale of a patent or proprietary medicine, no matter how noxious, and without regard to the responsibility of the person making the sale, would be lawful if made at a fixed establishment, while a sale made by a skilled physician of a beneficial drug would violate the statute, if the seller could be properly described as "an itinerant."

The manufacture and sale of patented or proprietary drugs are lawful transactions; the articles are recognized articles of commerce, and, in the absence of a showing that the article thus sought to be put upon the market is deleterious, its sale cannot be prohibited.

*Schollenberger* v. *Pennsylvania*, 171 U. S. 1.

That patented and proprietary remedies are recognized as legitimate articles of commerce is abundantly shown by the fact that no prohibition against them, so far as we know, is found in the federal or any of the state laws, while the federal laws contain abundant provisions to prevent adulteration, deception or fraud in their sale.

An Act of Congress entitled Food and Drugs Act, June 30, 1906, Volume 34, U. S. Statutes at Large, page 768.

2d Revised Laws of Louisiana, 1904, page 1232, Pharmacy Laws.

The Food and Drug Regulations of the State of Louisiana, adopted by the State Board of Health July 1, 1913.

The United States Food and Drug Act above mentioned is a very comprehensive and valuable statute, and by its terms it expressly recognizes the fact that proprietary medicines, drugs, nostrums, ointments, etc., are lawful merchandise, and the act both regulates and protects the business as a lawful and useful one.

An examination of the pharmacy laws above mentioned will show that this act does not undertake to control much less prohibit the sale by any person of proprietary drugs, nostrums, ointments, etc. The act only applies to pharmacists who "compound medicines, drugs or chemicals," and makes no mention of proprietary remedies in any manner, thereby clearly recognizing that the sale of these remedies can be safely made by all persons without their being registered pharmacists, or requiring of them any qualifications of any kind.

The food and drug regulations made by the State Board of Health of Louisiana have all the force of a statute law in that state, and the board has enacted a very complete code of rules which control this subject fully. There is nothing in these rules which prohibits the sale of proprietary medicines, drugs, etc., by an itinerant vendor; in fact, clause 2 of Rule 553 of said board expressly exempts the sale of proprietary medicines of the class mentioned in the agreed statement of facts in the case at bar.

From the foregoing authorities it is clearly shown that the business and occupation which the Louisiana law in question attempts to prohibit is a lawful one. In fact, we know of no authority which does not so hold. On the contrary, there are many

authorities which expressly hold that the business is a lawful one, and the sale of these remedies can be as safely made by one person as another.

The Supreme Court of Minnesota in considering a statute of that state regulating the practice of pharmacy said that:

> "* * * But, because it was deemed either impracticable or unnecessary to regulate the sale of patent or proprietary medicines, of the acts of nearly thirty state or territories regulating the practice of pharmacy (all so nearly alike as to suggest a common source) which we have examined, every one, unless ours be an exception, expressly excepts the sale of patent or proprietary medicines from its operation. Probably the reason is that merely to limit their sale to pharmacists would furnish no protection to the public, without some further regulation as to inspection or analysis. * * *"
>
> *State* v. *Donaldson, supra* (p. 81).

This seems to still be the consensus of opinion.

> Westervelts' Pure Food & Drug Laws.
>
> *Noel* v. *People*, 187 *ib.* 587.

What was said in the foregoing statement by the Minnesota court was true of the pharmacy laws of the various states at that time, that is:

> "Of the acts of nearly thirty states or territories regulating the practice of pharmacy (all so nearly alike as to suggest a common source) which we have examined, every one, unless ours be an exception, expressly excepts the sale of patent or proprietary medicines from its operation,"

and an examination of the pharmacy laws at this date shows that practically all of them permit the

sale of patent or proprietary drugs, medicines, etc., without any regulations or restrictions, and this is true, as we have heretofore said, of the laws of Louisiana.

The sale of these articles of commerce being then an act which the State of Louisiana could not, and indeed did not, desire to prohibit, since in the selling there is, as said by the Supreme Court of Minnesota, "* * * Nothing that calls into use any skill or science on the part of the one who sells * * * " (*State* v. *Donaldson, supra*), we need not go far to find the motive for this enactment. It was plainly to give a monopoly to the local dealers.

Whatever may be said as to how far courts may go in questioning the motives actuating legislation, the purpose and effect of a statute are always proper subjects for judicial investigation, and, if the purpose is plainly unlawful and the statute will only effectuate that unlawful purpose, the court will refuse its sanction.

*Gunderling* v. *Chicago*, 177 U. S. 183.
*Mugler* v. *Kansas*, 123 *ib.* 623.
*Cotting* v. *Kansas City Stock Yards*, 183 *ib.* 79.
*Holden* v. *Hardy*, 169 *ib.* 366.
*Lawton* v. *Steele*, 152 *ib.* 133.
Civil Rights case, 109 *ib.* 23.
*Barbier* v. *Connolly*, 113 *ib.* 27.
*Butchers Union* v. *Crescent City Co.*, 111 *ib.* 746.
*Allgeyer* v. *Louisiana*, 165 *ib.* 578.
*Lochner* v. *New York*, 198 *ib.* 45.
*Yick Wo* v. *Hopkins*, 118 *ib.* 356.

*In re* Jacobs, 98 N. Y. 98.
*People* v. *Wilson*, 249 Ill. 195.
*Noel* v. *People*, 187 *ib.* 587.
*State* v. *Donaldson*, 41 Minn. 74.
*Chicago* v. *Netcher*, 183 Ill. 104.
*City of Carrollton* v. *Bazzette*, 159 *ib.* 284.
*Price* v. *People*, 193 *ib.* 114.
*Spiegler* v. *Chicago*, 216 *ib.* 114.
*State* v. *Loomis*, 115 Mo. 312.
*State* v. *Scougal*, 3 S. D. 55.
*State* v. *Ashbrook*, 154 Mo. 375.
*State* v. *Bayer*, 34 Utah 257.

In many of the foregoing decisions the courts did not hesitate in passing on these trade statutes to point out that many of them were mere subterfuges, and that under the pretended or so-called police power of the state the statutes have been passed for no other purpose than to oppress or prohibit a lawful business by one class of citizens for the purpose of protecting another class, and giving them a monopoly of the business therein mentioned.

In the case of *Lawton* v. *Steele, supra,* it was said in an opinion by Mr. Justice Brown at p. 137 that:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from a particular class, require such interference, and, second, that the means was reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The Legislature may not under the guise of protecting the pub-

lic interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations."

On this same question this court, in the case of *Lochner* v. *New York, supra,* declared as follows:

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health and welfare, are in reality passed from other motives. We are justified in saying so, when from the character of the law, and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law."

In the case of the *State* v. *Donaldson, supra,* the court said:

> "A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of the public health it must be a health law, having some relation to public health. * * * If it is apparent on the face of the act that its provisions from their very nature cannot and will not conduce to any police purpose, it is the right, as well as the duty, of the court to pronounce it invalid."

The provisions of the Louisiana statute here called in question favors monopoly and is against competition and is against the declared policy of the federal as well as of every state government.

*Natl. Cotton Oil Co.* v. *Texas,* 197 U. S. 129.

And such statutes have been almost universally condemned as being arbitrary and unwarranted classifications of persons or things interfering with

individual liberty and intended to benefit some favored class.

*Williams* v. *State*, 99 Ark. 149.
*People* v. *Wilson*, 249 Ill. 195.
*State* v. *Donaldson*, 41 Minn. 74.
*Commonwealth* v. *Payne Medicine Co.*, *supra*.

On this subject we desire to quote from 1 Tiedeman, State and Federal Control, 505, wherein we think that author has correctly stated the law on this question in the following language:

> "It has been so often explained and stated that the police power must, when exerted in any direction, be confined to the imposition of those restrictions and burdens which are necessary to promote the general welfare. * * * Where it is possible to conduct the business without harm to the public all sorts of police regulations may be instituted, which may tend to suppress the evil. Licenses may be required, the most rigid system of police inspection may be established, and heavy penalties may be imposed for the infractions of the law; but if the business is not inherently harmful the prosecution of it cannot *rightfully* be *prohibited* to one who will conduct the business in a proper and circumspect manner. Such a one would *'be deprived of his liberty'* without due process of law."

The plaintiff in error may not therefore be deprived of his right to engage in selling these articles by any purely arbitrary and fanciful distinction between him and the rest of the community. To be sustained, a law of this character must have a reasonable basis. It must afford some reasonable expectation of keeping noxious articles from the mar-

ket, prescribe reasonable qualifications for those who shall be permitted to follow a calling which requires special attainments, but individuals may not be arbitrarily classified because of the business methods, lawful in themselves, which each may determine to adopt. It is impossible to imagine any classification which would not be sustained if that under consideration is proper.

The statute therefore seeks to deprive plaintiff in error of his right to engage in a legitimate business, and if enforced would deprive him of the liberty guaranteed by the Constitution.

**Sixth:**

**The Statute Denies to Plaintiff in Error Equal Protection of the Laws.**

Since under the Louisiana statute "all others" except "itinerant vendors" are permtited to do the acts for the doing of which the plaintiff in error has been adjudged criminally liable all that we have said as to the deprivation of liberty is equally applicable to our claim that he has been denied equal protection of the law, and this court, as well as many of the state courts, have held that this cannot be done.

This court in the case of *Cotting* v. *Kansas City Stock Yards Company, supra,* in an opinion by Mr. Justice HARLAN, speaking for the court at p. 562, said:

> "In prescribing regulations for the conduct of trade it (the state) cannot divide those engaged in trade into classes and make criminals of one class if they did certain forbidden things, while allowing another and favored class en-

> gaged in the same domestic trade to do the same thing with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly to build up or protect particular interests or industries. It is quite a different thing for the state, under its general *police power* to enter the domain of trade or commerce and discriminate against some by declaring that particular class within its jurisdiction shall be exempted from the operation of a general statute, making it criminal to do certain things connected with domestic trade or commerce. Such a statute *is not* a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

In the case of *State* v. *Loomis*, 115 Mo. 313, a statute was held to be unconstitutional because of arbitrary classification, and in the opinion the court said:

> " * * * But classification for legislative purposes must have some reasonable basis upon which to stand, it must be evident that differences which would serve for the classification for some purposes, furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

In the case of *State* v. *Ashbrook, supra*, the Supreme Court of Missouri, in discussing classifications made in a statute, at page 629 says:

> "In order to sustain legislation of the character of the act in question as a police measure, the courts must be able to see that its object to

some degree tends toward the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety or welfare. If no such object is discernible, but the mere guise and masquerade of public control, under the name of 'An act to regulate business and trade,' etc., is adopted, that the liberty and property rights of the citizens may be invaded, the court will strike down the act as unwarranted."

Another case that is considered a leading one on this question is that of *The People* v. *Gilson*, 17 N. E. 343 (N. Y.), wherein Judge PECKHAM, speaking for the court, at page 345 says:

"It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation, under consideration. It is evidently of that kind which has been so frequent of late—a kind which is meant to protect some class in the community against the fair, free and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore, flying to the legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors, in the commercial, agricultural, manufacturing or producing fields."

The same principle was announced in a very important case, which was before this court, that of *Mugler* v. *Kansas*, 123 U. S. 623, wherein Mr. Justice HARLAN in very forceful language, at page 661, said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limit of its au-

thority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution"

**Seventh:**

**The Statute is Equally Obnoxious Under the Construction Placed Upon it by the Supreme Court of Louisiana.**

If it should be said that the meaning placed upon Section 12 by the Supreme Court of Louisiana in the Lee case is controlling, and that the refusal of the District Court of Louisiana to follow that construction presents no Federal question, the judgment should be reversed because the statute, thus construed, makes an arbitrary classification of individuals and still permits the *resident* vendor to sell the article (professing by it to cure disease) and denies the same right to the *itinerant vendor*.

It cannot, we think, be successfully claimed that the sale of a patent or proprietary medicine contained in a sealed package or bottle upon or within which are the printed directions for its use constitutes a representation by the vendor, nor does the act of selling such an article necessarily imply a profession upon the part of the seller as to the treatment or cure of the disease.

The representation so made is the representation of the manufacturer. His acts and conduct are entirely proper subjects for regulation, generally, both

by the state and federal governments. Without further discussion of these suggestions, it is apparent, that, if the mere sale of such an article constitutes a representation upon the part of an "itinerant vendor," the same representation is made when the same act of selling is performed by a resident dealer.

It is perfectly obvious that a statute like the one in question which attempts to prohibit the sale by an itinerant vendor of proprietary drugs, nostrums, etc., with "written and printed directions around the bottles or packages" in its effect absolutely prohibits the sale of such remedies by an itinerant vendor for the reason that there are no proprietary medicines put upon the market by *any one* which do not have these *written and printed directions* on the packages or bottles.

No matter how we consider the statute, we finally reach the same result; its effect is to make an arbitrary distinction between individuals.

From the foregoing plaintiff in error contends that the Louisiana statute in question is unconstitutional in that it violates Article I of the Fourteenth Amendment to the United States Constitution. We, therefore, ask that the judgment of the Third Judicial District Court, Parish of Claiborne, State of Louisiana, be reversed and the information against the defendant dismissed.

JOHN A. BARNES,
THOMAS D. O'BRIEN,
*Attorneys for Plaintiff in Error.*

## APPENDIX A.

### Medical Practice Act of Louisiana.

PHYSICIANS.

Practice of Medicine, Surgery and Midwifery.

Act 49, 1894. Laws Louisiana.

"An Act to regulate the practice of medicine, surgery and midwifery: to create State Boards of Medical Examiners and to regulate the fees and emoluments thereof; to prevent the practice of medicine, surgery and midwifery by unauthorized persons; and to provide for the trial and punishment of violators of the provisions of this Act by fine and imprisonment, or both; and to repeal all laws or parts of laws in conflict or inconsistent with this Act."

(Who may engage in.)

SECTION 1. "That from and after the promulgations of this Act no person excepting those already engaged under existing laws in the practice of medicine, surgery and dentist, shall practice medicine in any of its departments within the State of Louisiana unless such person shall possess all the qualifications required by this Act."

* * * * *

(Itinerant Vendors.)

SECTION 12. "That any itinerant vendor of any drug, nostrum, ointment, or application of any kind, intended for the treatment of disease or injury or

who may, by writing, print or other methods, profess to cure or treat disease or deformity by any drug, nostrum, manipulation, or other expedient in this state shall, if found guilty, be fined in any sum not less than twenty-five (25) dollars and not exceeding one hundred (100) dollars for each offense, to be recovered in any action of debt, before any court of competent jurisdiction, or shall be imprisoned for a term of not less than ten (10) days or more than thirty (30) days or be both fined and imprisoned."

(Who may be considered as practicing medicine.)

SECTION 13. "That any person shall be regarded as practicing medicine in any of its departments within the meaning of this act who shall append the letters M. D. or M. B. to his or her name, or repeatedly prescribe or direct for the use of any person or persons any drug or medicine or other agency for the treatment or cure or relief of any bodily injury, infirmity or disease. This act shall not apply to farmers and planters when exclusively practicing without compensation on their employes and tenants."

(Penalties for violation.)

SECTION 14. "That if any person shall practice medicine in any of its departments, in this state, without first having obtained the certificate herein provided for, or contrary to the provisions of this Act, the Board of Medical Examiners created by this Act may through their respective Presidents cause to issue in any competent court a Writ of Injunction forbidding and enjoining any person from further practicing medicine in any of its departments

in this state until such person shall have first obtained the certificate herein provided for and under the provision of this Act.

That said injunction shall not be subject to being released on bond. That in the same suit in which said injunction may be applied for, the said boards through their respective presidents, may sue for and demand of the defendant a penalty not to exceed one hundred dollars, and in addition thereto Attorney's fees not to exceed fifty dollars, besides the costs of court; Judgment for which penalty, Attorney's fees and costs may be rendered in the same judgment in which the injunction may be made absolute. That the trial of said proceedings shall be summary and be tried by the Judge without the intervention of a jury."

(As amended by Act 13, 1896.)

* * * * *

SECTION 17. "This Act shall not apply to any commissioned surgeons of the United States army, navy or marine hospital service; to physicians or surgeons from other states or territories in actual consultation with registered physicians of this state; nor to any physician actually practicing in this state before the passage of this Act and in accordance with the then existing laws."

* * * * *

## APPENDIX B.

### Article 85, Constitution of Louisiana.

Article 85, Constitution of Louisiana.

"The Supreme Court except as hereinafter provided shall have Appellate Jurisdiction only, which jurisdiction shall extend to cases where a law of this state has been declared *unconstitutional* * * * to criminal cases on questions of law alone whenever the punishment of death, or imprisonment at hard labor may be inflicted, or a fine exceeding three hundred dollars or imprisonment exceeding six months, is actually imposed. * * *"

Article 94, Constitution of Louisiana.

"The Supreme Court shall have control and supervision over all inferior courts. The court or any justice thereof, shall have power to issue writs of *certiorari, prohibition,* mandamus, *quo warranto,* and other remedial writs."

Article 109, Constitution of Louisiana.

"The District Courts, except in the parish of Orleans, shall have original jurisdiction in all civil matters where the amount in dispute shall exceed fifty dollars, exclusive of interest and in all cases where title to real estate is involved or to office, or other public position or civil or political rights, and all other cases when no specific amount is in contest, except as otherwise provided in this Constitution. They shall have *unlimited* and *exclusive original jurisdiction* in all criminal cases, except such as may

be invested in other courts and authorized by this Constitution * * *. There shall be one District Judge in each Judicial district * * *."

Article 133, Constitution of Louisiana. (Jurisdiction, Civil, District Courts.)

"The civil District Courts shall have * * * exclusive jurisdiction * * * *in all other* cases, except as hereinafter provided, where no specific amount is involved * * * and said court shall have authority to issue all such writs, processes and orders * * * for the purposes of the jurisdiction herein conferred upon it."

(The italics are ours.)

Supreme Court, U. S.
FILED
JAN 7 1914
JAMES D. MAHER
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1913.

No. 170.

J. C. BACCUS,
*Plaintiff in Error,*

vs.

THE STATE OF LOUISIANA,
*Defendant in Error.*

In Error to the Third Judicial District Court, Parish of Claiborne, State of Louisiana.

## Reply Brief and Argument of Plaintiff in Error.

JOHN A. BARNES AND
THOMAS D. O'BRIEN,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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IN ERROR TO THE THIRD JUDICIAL DISTRICT COURT, PARISH OF CLAIBORNE, STATE OF LOUISIANA.

## Reply Brief and Argument of Plaintiff in Error.

In this brief it is desired to reply to the arguments adduced by the Honorable, the Attorney General of Louisiana in support of the motion to dismiss, as well as those upon the merits of the case.

### I.

THE FEDERAL QUESTION HERE FOR REVIEW WAS PRESENTED TO THE STATE COURT, AND, BY THE JUDGMENT OF CONVICTION NECESSARILY DETERMINED ADVERSELY TO PLAINTIFF IN ERROR.

The decisions including those cited by counsel for defendant in error seem unanimous upon this question. The fact that the judge of the District Court

doubted the validity of the statute, but felt constrained to hold it valid, is only important because of the respect due to the opinion thus expressed by a judicial officer of Louisiana.

The claim that the statute was repugnant to the Federal Constitution was presented, clearly and emphatically and the judgment of conviction necessarily involved a finding that the statute was valid and in no way repugnant either to the state or federal organic law.

As was said in *Saussere* v. *Gailand,* 127 U. S. 216, at page 234:

> " * * * it must appear affirmatively not only that a federal question was presented for decision to the highest court of the state, having jurisdiction, but that its decision was necessary to a determination of the cause, and that it was actually decided, *or that the judgment as rendered could not have been given without disregarding it.*" (Our italics.)

In *Ry. Co.* v. *Ry.,* 13 How 71, it was said (page 80):

> " * * * 'there was drawn in question the validity of a statute and authority exercised under the State of Virginia,' 'on the ground of this being repugnant' to that clause of the 'Constitution of the United States' which forbids a state to pass 'any law impairing the obligation of contracts,' and 'the decision of the court being in favor of their validity' there can be no doubt of the jurisdiction of this court to review the decision of the State Court."

*Kimball* v. *Kimball,* 174 U. S. 158.

*Windsor* v. *McVeigh,* 93 *Id.* 274.

*Thoman* v. *Frame,* 176 *id.* 350.

*Gregory* v. *McVeigh,* 23 Wall. 294.

*Brown* v. *New Jersey*, 175 U. S. 172.
*Cummings* v. *Board*, 175 *id.* 528.
*Roller* v. *Holly*, 176 *id.* 398.
*Guaranty* v. *Bladoin*, 176 *id.* 448.
*Hawker* v. *People*, 170 *id.* 189.

It is proper also to say, although the question is not raised, that the foregoing authorities sustain these proceedings in their entirety.

## II.

### THE STATUTE AS ENFORCED HAS NO RELATION TO PHYSICIANS OR THE PRACTICE OF MEDICINE.

There is of course no doubt as to the right of the state to regulate physicians and the practice of medicine, and any statute to that end operating fairly and equally upon individuals would be valid. But as pointed out in the main brief, the defendant was convicted, not of practicing medicine, but of selling or dispensing a patent or proprietary drug.

The validity of the statute must be determined by considering it as construed and applied in this case. Had plaintiff in error been accussed of "professing to cure disease" we would have presented, the question whether the mere sale of a patented remedy necessarily implied a profession upon the part of the vendor of ability to cure by means of the drug, or otherwise.

This is not a case where the complaint is founded merely upon some error in the procedure, for instance, a faulty indictment, but is one where the law as interpreted and applied by the state, through its

judicial department, violates the Federal Constitution.

Thus as said in *Yick Wo* v. *Hopkins,* 118 U. S. 356 (page 373):

> " * * * though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

So in this case, while the good intentions, integrity and fairness of the judicial officer is recognized and appreciated, we insist that it is the construction placed upon the law in this case as shown by the indictment and agreed facts, and the method of its application as shown by the record now here, which must determine the result.

## III.

THE AGREED FACTS CORRECTLY STATE "THAT ALL PERSONS, EXCEPT ITINERENT VENDORS HAVE THE RIGHT TO SELL SAID REMEDIES * * *"

Plaintiff in error was convicted of selling as an itinerant vendor, patent or proprietary drugs. (Rec., page 3.)

It is therefore entirely beside the question, here presented, whether the act would be valid if applied to the sale of other drugs, since his complaint is that he has been, solely because he is an itinerant, denied a right and privilege enjoyed by all except itinerants.

*Strander* v. *West Virginia,* 100 U. S. 303.

*I. C. C.* v. *Ry. Co.*, 190 U. S. 284.
*State* v. *Currens*, 111 Wisc. 431.
*Brown* v. *Ohio Valley Ry. Co.*, 79 Fed. 176.
*Pittsburg* v. *Montgomery*, 152 Ind. 1.

In the brief for defendant, counsel questions the correctness of the agreed facts upon which the convictions was based. Upon the question here involved the agreement was:

> " * * * all persons except itinerant vendors have the right to sell said remedies, that is *patent and proprietary* drugs, nostrums, ointments and applications intended for the cure of diseases." (Rec., 3.)

The pharmacy laws of Louisiana (2 Revised Laws, La. 1232) first forbid the compounding of medicines by unauthorized persons, but in Section three of the Act (P. 1233, 2 R. L. La.) the following appears:

> " * * * Provided, that nothing contained in this act shall in any manner whatever interfere with the business of any registered practitioner * * * nor shall it interfere with the making and dealing in proprietary remedies popularly called patent medicines * * * "

If, therefore, Section 12 of Act 49 (2 R. L. La., p. 1239) prohibits only the selling of drugs by itinerant vendors we have when the statutes are considered together, exactly the condition set out in the agreed statement upon which the conviction was based.

In this connection we desire to correct a statement in our main or original brief. It is stated in the second paragraph on page 17, "the pharmacy laws (of Louisiana) make no mention of proprietary remedies." We believe we have given above a correct statement as to the law.

## IV.

TO PROHIBIT THE SELLING BY ITINERANTS OF LAWFUL ARTICLES OF COMMERCE WOULD BE TO DEPRIVE INDIVIDUALS OF LIBERTY AND DENY THEM EQUAL PROTECTION.

While the legislative enactments of states and municipalities contain many provisions regulating peddlers and itinerant vendors, it has never, we believe, been understood or thought, that a state could *prohibit* the sale in such a manner, of a lawful article of trade and commerce.

The remedies, for the selling of which the plaintiff was convicted, were lawful articles of commerce even under the positive enactments of the State of Louisiana, and would necessarily be so regarded under the laws and regulations of Congress and the federal department, as well as the general practice and consensus of opinion, as shown by the laws of the various states.

*Schollenberger* v. *Pennsylvania*, 171 U. S. 1.
*Austin* v. *Tennessee*, 179 U. S. 343.
*People* v. *Noel*, 187 Ill. 587.
*People* v. *Wilson*, 249 Ill. 195.

## V.

THE CLAIM MADE BY DEFENDANT IN ERROR THAT IT IS NECESSARY IN THE INTEREST OF THE PUBLIC HEALTH TO CONFINE THE SALE OF PROPRIETARY MEDICINES TO LOCAL DEALERS IS WITHOUT FORCE.

The use of these proprietary remedies is almost universal. Indeed we feel safe in saying there is

scarcely a household in the State of Louisiana that does not from time to time use such remedies, and their sale by local dealers is, as we have said before, without any restriction or regulation whatever.

In the case of the *People* v. *Noel, supra,* the court at pages 593-4 said:

> "These patent and proprietary medicines and remedies are generally put up in sealed packages. In this form they can as well be sold by any person as by a registered pharmacist. * * * Registered pharmacists will be as apt as other men to sell such patent medicines as there is public demand for when they are relieved of all responsibility for the character of such medicines, and are not required in any way to guarantee their character or adaptability to the cures which they claim to effect."

The foregoing it seems to us is a complete answer to the argument by the attorney for the defendant in error on pages 10 and 11 of his brief. The attorney general on page 11 of the brief, says:

> "The object of the legislature in passing the act assailed herein was to protect competent and qualified physicians in their practice, and to protect the public, as well as to guard the public from the imposition of quacks and charlatans."

We are inclined to disagree with the learned attorney general as to the object of the passage of this law. The reason in our mind which actuated the legislature was the protection of the local dealer in these remedies; at least as the law is applied, it has that effect. The legislature in passing this act divided the dealers in proprietary remedies into two classes, local dealers and itinerant dealers. It is not denied by the plaintiff in error that it is proper to

divide the dealers in proprietary medicines into two classes, if it is deemed necessary to regulate each class, but it cannot be said to be a police measure in the interest of the public health to say that a local dealer may without any regulation whatever engage indiscriminately in the sale of proprietary medicines and arbitrarily prevent itinerant dealers from engaging in the business at all. The business is the same whether it is carried on by the local dealer or an itinerant dealer, the difference being that in one case the citizen goes to the local merchant and buys the remedy, while in the other case the dealer takes the *same* medicine to the citizen. There is in neither case, as was said in the case of the *State* v. *Donaldson,* 41 Minn. 174:

> " * * * Nothing that calls into use any skill or science on the part of one who sells them; one man can do it just as well as another. The fact that the seller is a pharmacist of itself furnishes no protection to the public."

Doubtless the legislature of Louisiana had this fact in mind when it enacted the present pharmacy law of that state, for in the proviso to Section 3 of the act it says:

> " * * * Nor shall it interfere with the making and dealing in proprietary remedies, popularly called patent medicines. * * * "

and if it be true that it will not protect the public in any way to limit the sale of these remedies to pharmacists, how can it be said that it is in the interest of the public health to limit their sale to local merchants and druggists?

We desire to quote again from the case of the *State* v. *Donaldson, supra,* wherein that court says that:

"* * * A statute merely limiting the sale of patent medicines to a particular class would not, and could not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of the state."

*Yick Wo* v. *Hopkins, supra.*

*Atchison, Topeka & Santa Fe R. R.* v. *Matthews,* 174 U. S. 97.

In the latter case in discussing the equal protection guaranteed by the fourteenth amendment when considering a Kansas statute on the question of classification, it is said:

"* * * Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even when the selection is not obviously unreasonable and arbitrary, if the classification is based upon matters which have no relation to the object sought to be accomplished the same conclusion of unconstitutionality is affirmed."

The case of Blue Mountain Joe, 129 Ill. 370, cited by the attorney for the defendant in error in his brief on pages 8 and 9, is not an authority in this case. The only question presented for decision in that case was whether the title to the Act to regulate the Practice of Medicine in Illinois was broad enough to include itinerant vendors, and the court held that it was. The merits of the act as a police regulation were not passed upon by the court in that case.

This same statute regulating the practice of medi-

cine in Illinois was before the court in a very much later case, that of the *People* v. *Wilson, supra,* where the same court in passing upon the itinerant vendor's section of the statute held the law unconstitutional, in very vigorous language, and not only held the statute unconstitutional, but went farther in discussing the question, and said that

> "We think that a valid statute cannot be passed which accomplishes by indirection what is held in that case (*People* v. *Noel, supra*) could not be accomplished directly, that is, instead of providing in direct terms by a statute that no person other than a druggist shall vend patent or proprietary medicines, pass a statute which imposes so high a license fee for the vending of patent and proprietary medicines that no itinerant vendor can afford to take out a license, the practical operation of which would be to give the druggists of the state a monopoly of that business."

The Illinois statute under which the foregoing decision was rendered was not as objectionable as the Louisiana statute involved in the case at bar, for the Illinois statute did permit the sale of these proprietary remedies by an itinerant vendor upon the payment of a license fee, while in the case at bar the law arbitrarily prohibits the business or vocation of the sale of such remedies by an itinerant vendor. For the reason that the Illinois statute under which the Blue Mountain Joe decision was rendered has since been declared unconstitutional on its merits as a police measure, we hold that the case is not an authority in this case.

To us the conclusion seems irresistible that the prosecution and conviction of the plaintiff in error

violated Article 1 of the fourteenth amendment to the United States Constitution in the manner claimed.

Respectfully submitted,

JOHN A. BARNES,
THOMAS D. O'BRIEN,
*Attorneys for Plaintiff in Error.*

## MOTION TO DISMISS OR AFFIRM.

No. 524.

J. C. BACCUS,

vs.

STATE OF LOUISIANA.

Now comes the State of Louisiana, the defendant in error, through its Attorney General, Ruffin G. Pleasant, and G. A. Gondran, of counsel, and moves this Honorable Court to dismiss the writ of error in this case, for want of jurisdiction in this Honorable Court because the judgment of the Third Judicial District Court of the State of Louisiana to which said writ of error was directed did not pass upon and decide the Federal questions raised and presented by plaintiff in error in the pleadings in said State District Court.

That there were two grounds of unconstitutionality interposed; one Federal, the other State, each broad enough to determine the validity of the law attacked. That the unconstitutionality of the law assailed, Section 12 of Act 49 of 1894, was only raised in the motion to quash the Bill of Information, and the grounds of unconstitutionality are:

1st. That Section 12 of Act 49 of 1894 is in contravention to Articles 2, 6 and 15 of the Constitution of the State of Louisiana.

2nd. That said Section 12 of Act 49 of 1894 is in contravention of Section 1 of the Fourteenth Amendment to the United States Constitution. (a) It prevents a citizen

from pursuing a lawful vocation; (b) it denies to other citizens rights enjoyed by all others in the State.

The ruling of the Third Judicial District Court of the State or Louisiana in overruling the motion to quash was to this effect:

> **"The Court briefly states that it was in doubt with reference to the constitutionality of Section 12 of Act 49 of 1894, and considering the fact that the Supreme Court of the State of Louisiana was the proper and competent authority to pass upon the constitutionality of the question, the Court overruled the motion to quash."**

The final judgment rendered in the case by the Third Judicial District Court was one of "guilty" of the offense charged, and the plaintiff in error was condemned under said judgment to pay a fine of $100 and costs, and in default of payment of said fine and costs, that he be incarcerated in the Parish Jail of Claiborne Parish for a period of sixty days.

The judgment on the motion to quash does not declare whether the validity of the law assailed was upheld as not being offensive to the Constitution of the State of Louisiana, or not in violation of the Constitution of the United States, and, therefore, it does not affirmatively appear whether or not the Third Judicial District Court of Louisiana decided the Federal question raised and presented by the pleadings; and it does not necessarily appear that the decision and the judgment rendered was in conflict or in violation of the Federal question raised; *non constat* that the decision of the Third Judicial District Court of the State of Louisiana maintaining the validity of the law assailed was based upon its non-offensiveness to the Constitution of the State of Louisiana. The final judgment of the District Court which found the plaintiff

in error guilty as charged is clearly silent upon the Federal question presented and raised in the pleadings.

And in the alternative, if the writ of error should not be dismissed, then that the judgment of the Third Judicial District Court of Claiborne Parish, State of Louisiana, be affirmed, on the grounds that, although, in the opinion of this Court, the record may show that this Court has jurisdiction, it is manifest that said writ was taken for delay only, and that the question on which jurisdiction depends is so frivolous as not to need argument.

R. G. Pleasant

*Attorney General of the State of Louisiana.*

G. A. Gondran

*Of Counsel.*

NOTICE OF SUBMISSION OF MOTION TO DISMISS WRIT OF ERROR.

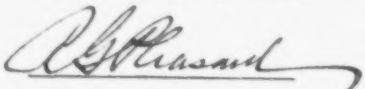
RICHARDSON & RICHARDSON,
*Counsel Representing Plaintiff in Error, J. C. Baccus,*
*J. C. Baccus,*
*Homer, Claiborne Parish, Louisiana.*

GENTLEMEN:—Please take notice that on the 13th day of October, 1913, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed is a copy of our brief of argument submitted with the said motion in support thereof.

R. G. PLEASANT,
*Attorney General of the State of Louisiana.*

G. A. GONDRAN,
*Of Counsel.*

I hereby certify that the foregoing motion to dismiss and a copy of the brief of argument submitted with the said motion in support thereof were both served on Messrs. Richardson & Richardson, attorneys for the plaintiff in error,



*Attorney General of the State of Louisiana.*

ON MOTION TO DISMISS.

It will be seen from the record in this case, and the reasons assigned by the Judge of the District Court, that no Federal question was ever decided by the Court. The only allusion to such a question is to be found in the motion to quash the information. The Court, in its *per curiam* on the Bill of Exception reserved to the overruling of the motion to quash, says: Trans., p. 4.

> "The motion to quash is based on the unconstitutionality of Section 12 of Act 49 of 1894; the Court briefly states that it was in doubt with reference to the Constitutioality of Section 12 of Act 49 of 1894, and considering the fact that the Supreme Court of the State of Louisiana was the proper and competent authority to pass upon the constitutionality of this question, the Court overruled the motions for the above reasons."

It is clear, therefore, that the Court did not pass upon the Federal question raised in the motion to quash; on the contrary, it expressly relegated the constitutional question raised to the Supreme Court of the State of Louisiana, and this Court being without jurisdiction, refused to pass upon any question raised in the lower Court.

As no Federal question was decided or passed upon by the District Court, or the Supreme Court of the State of

Louisiana, we therefore say that this Honorable Court is without jurisdiction. There is nothing in the record to show whether the District Court rendered its decision upon a Federal ground, or whether it maintained the information on the other grounds urged in the motion to quash. Its condusion is no more than a refusal to maitnain the motion. In *Eustis vs. Bolles*, 150 U. S. 351, it was decided "that when there is a Federal and State question in the case, and the latter is sufficient to sustain the judgment, this Court will not review the judgment, and the logical course is to dismiss the writ of error." Under this ruling, it is clear that if the District Court decided that the indictment could be maintained under the State Constitution, alhough attacked on Federal grounds, and no decision was rendered thereon, there was no decision on the Federal question. In *Maguire vs. Tyler*, 8 Wall. 650, this Court said:

> "If, however, the State question have that quality and there be uncertainty as to the ground for decision, this Court will not assume jurisdiction."
>
> *Dibble vs. Bellingham Bay Sand Company*, 163 U. S. 63.
>
> *Allen vs. Arguimbau*, 198 U. S. 149.

In *Commercial Bank vs. Rochester*, 15 Wall. 639, the Supreme Court of the United States said, through Justice Miller:

> "It has been so often held by this Court that the question on which the plaintiff in error relies to give it jurisdiction must appear to have been decided by the State Court, that it has become one of the settled principles on that subject, and further, it is said in this case that the Court (State Court) must have decided in favor of the validity of the tax which it is conceded would have given this Court jurisdiction, but this does not appear, either affirmatively or by

> necessary intendment, if the case may have been decided on the form of the remedy which the practice in the State Court required the plaintiff to adopt, or on the technical insufficiency of the pleading. In this uncertainty of the record, as an indication, we might, without going further, dismiss the case on that ground."

In *Phoenix Insurance Company vs. the Treasurer (Phoenix Insurance Company vs. Gardiner)*, 11 Wall. 204, there was a possibility of these grounds of decision, Federal and local, and this Court declined to review the judgment. In *Bachtel vs. Wilson*, 204 U. S., this Court said, by Justice Brewer:

> "That before we can pronounce a judgment of a State Court to be in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly or even probably so."

In *Johnson vs. Risk*, 137 U. S. 300, this Court said:

> "That when the application of a State statute in a matter purely local was involved, if a plaintiff in error wished to claim that the cause was disposed of by the decision of a Federal question, he should obtain the certificate of the Supreme Court to that effect, or to ascertain in the judgment if such was the fact."

And in *Saussere vs. Gaillard*, 127 U. S. 216, this Court said:

> "That to give this Court jurisdiction of a writ of error to the State Court, it must appear affirmatively, not only that a Federal question was presented for decision, but that its decision was necessary to the determination of the case, and that it was actually

> decided, or that the judgment, as rendered, could not have been rendered without deciding it."

In *Consol; Turnpike vs. Norfolk Ry. Co.*, 228 U. S. 331, this Court said:

> "It must appear that some right, privilege or immunity, was claimed under the Constitution, or some statute of the United States; and that the decision was against the right, privilege, or immunity so claimed and specially set up by the plaintiff in error —and 'if a case is carried through the State Court upon arguments drawn from the State Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States,' and authorities therein cited."

In this case, the trial Judge said, "as he was in doubt as to the constitutionality of the Act he referred the matter to the Supreme Court of Louisiana."

In the case of *Consol vs. Turnpike*, just quoted, the Court held that the words "maturely considered" do not import a decision of the question made—just such an entry has been held to be no more than a refusal to rehear the case.

The ruling of the District Court in this case does not amount to any more than a denial of the motion, and does not show that the Federal question was considered or passed upon. It affords no basis for jurisdiction of this Court on the writ of error.

In *Preston vs. Chicago, etc.*, 226 U. S. 449, the Court said:

> "Whether the jurisdiction of the Court is properly involved depends upon whether any Federal right or

> immunity was duly set up or claimed by plaintiff in error in the State Court, *and there decided.*"

And in *Adams vs. Russell*, 230 U. S., this Court used the following language in maintaining the principles enunciated in the foregoing decision:

> "This rule is a salutary one in view of the different jurisdictions of the State Courts and of this Court. It leaves in both the full plentitude of their powers. It permits no evasion by the State Court of the responsibility for determining the Federal questions, if necessary to be determined. It permits no assumption by this Court of jurisdiction to review the decision of local questions. The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the Federal question, necessarily we have to consider, but, as was said in *Johnson vs. Risk:* 'Where a defense is distinctly made, vesting on local statutes, we should not, in order to reach a Federal question, resort to critical conjecture as to the action of the Court in the disposition of such defense.'
>
> "And, of course, the principle is applicable whether the question is presented as a ground of defense or a ground of action."

We submit that the motion to dismiss should prevail.

R. G. PLEASANT,
*Attorney General of the State of Louisiana.*

G. A. GONDRAN,
*Of Counsel.*

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1913.

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## No. 170.

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J. C. BACCUS,
*Plaintiff in Error,*

VERSUS

STATE OF LOUISIANA
*Defendant in Error.*

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*In Error to the Third Judicial District Court, Parish of Claiborne, State of Louisiana.*

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BRIEF OF THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

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SYLLABUS.

Section 12 of Act 49 of the State Legislature of Louisiana of 1894, does not violate the privilege or immunity clause of the Constitution of the United States. It is a part of an Act regulating the practice of medicine in the State of Louisiana, and a matter within the police power of said State.

The right to practice medicine is not one of such privilege and immunity as is protected by the Fourteenth Amendment of the Constitution of the United States.

The Section assailed should be taken as construed by the Supreme Court of Louisiana, to include itinerant vendors of drugs, etc., as practitioners of medicine.

The construction of Section 12 of Act 49 of 1894 of Louisiana by the Supreme Court of that State while perhaps not conclusive upon this Court, that construction is one towards which the Courts will lean.

*Atchison & R. R. Co. vs. Matthews*, 174 U. S. 101.
*Merchant vs. Penna. R. R. Co.*, 153 U. S. 380.
*Baltimore Traction Company vs. Bell R. Co.*, 157 U. S. 137.
*Minneapolis St. Railroad Co.*, 193 U. S. 53.
*Collins vs. Texas*, 223, U. S. 294.

"In construing the Act, consideration must be given to the purpose of the Legislature, and to the mischief intended to be guarded against, whether it is a fair and a reasonably valid exercise of the police power or arbitrary and capricious, must be determined in the light of the object sought to be obtained by the Act."

*Sutherland's Statutory Construction, Second Edition*, paragraphs 370-376-456.

"There is no vested right to practice the medical profession, free from supervision and regulation of the State."

*Bredwell vs. Illinois*, 16 Wall. 130.
*Reetz vs. Michigan*, 188 U. S. 505.
*Hawker vs. New York*, 170 U. S. 189.
*Dent vs. West Virginia*, 129 U. S. 114.

## Statement of the Case.

The plaintiff in error, J. C. Baccus, was prosecuted by information in the District Court of the Parish of Claiborne, State of Louisiana, for unlawfully selling drugs, nostrums, ointments and applications intended for the cure of disease and treatment of disease, and deformity, in violation of Section 12 of Act 49 General Assembly of Louisiana of 1894.

He filed, in the Third Judicial District Court of the Parish of Claiborne, State of Louisiana, a motion to quash the information on the following grounds:

1st. That Section 12 of Act 49 of 1894 does not state an offense; therefore, no bill of information can be based thereon.

2nd. That the Bill of Information does not set forth any offense known to the laws of Louisiana.

3rd. That the sale of drugs, etc., consisting of patent and proprietary drugs, etc., put up in sealed packages and bottles is not practicing medicine or violative of the Section 12 of Act 49 of 1894.

4th. That Section 12 of Act 49 of 1894 is class legislation, because it allows all other persons to sell these articles except itinerant vendors, and is in contravention of Articles 2, 6 and 15 of the Constitution of the State of Louisiana.

5th. That said Section 12 of Act 49 of 1894 is in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and it (a) prevents a citizen from pursuing a lawful vocation; (b) it denies to other citizens rights enjoyed by all others in the State.

6th. It is class legislation in its effect, as it gives to the local dealer a monopoly in the State of such drugs,

etc., and deprives the itinerant vendor or dealer of the privilege to sell such articles, and is therefore contrary to the State Constitution, Articles 2, 6 and 15, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The motion to quash was overruled by the trial Court on the following grounds:

> "The Court briefly states that it was in doubt with reference to the constitutionality of Section 12 of Act 49 of 1894, and considering the fact that the Supreme Court of the State of Louisiana, was the proper and competent authority to pass upon the constitutionality of this question, the Court overruled the motion to quash, for these reasons."
>
> Transcript, page 4.

The defendant was arraigned and pleaded "not guilty." He was regularly tried and found "guilty" and sentenced to pay a fine of $100 and costs, and in default of payment of the fine and costs, he be incarcerated in the parish jail of Claiborne Parish for sixty days. Transcript, page 7.

Subsequent to this conviction and sentence, he applied to the Supreme Court of Louisiana for writs of certiorari and prohibition. These were denied. Transcript, pages 8, 9 and 10.

The Supreme Court of the State of Louisiana was without jurisdiction. See Article 85, Constitution of Louisiana of 1898.

The case was tried in the Third Judicial District Court, for Claiborne Parish, Louisiana, being the highest Court in which a decision in the case could be held, on the following agreed statement of facts:

"That the defendant was an itinerant vendor of drugs, nostrums, ointments and applications for the cure of diseases, sell and hawk drugs and ointments, nostrums and applications intended for the cure of diseases, being then and there an itinerant vendor of drugs, ointments, nostrums and applications intended for treatment of diseases. It is also admitted that the said drugs, nostrums, ointments and applications intended for the cure of diseases and treatment of diseases, for which defendant was an itinerant vendor, were compounded and prepared by the Rawleigh Medical Company, of the State of Illinois, and that said remedies, drugs, nostrums, ointments and applications were put up in sealed packages or bottles ready for use with printed directions on the packages or bottles, and that defendant was an itinerant vendor of the same in original packages and bottles and prepared by the proprietors.

"It is also admitted that all persons except itinerant vendors have the right to sell said remedies, that is, patent and proprietary drugs, nostrums, ointments and applications, intended for the cure of diseases." Transcript, page 3.

It apparently appears from the agreed statement of facts that all persons, except itinerant vendors, have the right to sell drugs and nostrums, etc. This is an error, and it will not be denied that the only persons who are permitted to sell these drugs are druggists and farmers and planters and merchants regularly licensed under the laws of the State of Louisiana to do business at fixed places of business.

The plaintiff in error is in this Court on a writ of error to the State District Court.

BRIEF.

Plaintiff in error attacked the Constitutionality of Section 12 of Act 49 of 1894 on the grounds before stated.

The Act is known as "An Act to Regulate the Practice of Medicine, Surgery and Midwifery; to Create State Boards of Medical Examiners, and to Regulate the Fees and Emoulments thereof; to Prevent the Practice of Medicine, Surgery and Midwifery by Unauthorized Persons; and to Provide for the Trial and Punishment of Violators of the Provisions of this Act by Fine or Imprisonment, or Both; and to Repeal all Laws in Conflict With or Inconsistent With the Provisions of this Act."

In order to understand the scope and purpose of the Act, we give the substance of several of its sections:

Section 1. That after the promulgation of this Act, no one, except those already engaged in such practice under existing laws, shall practice medicine in the State, without the qualifications required by the Act.

Section 2. That to entitle a person to practice medicine, he must satisfy the Board of Examiners created by the Act that he is twenty-one years of age, of good moral character, and possessed of at least a fair primary education, and must present a diploma from a medical college in good standing; having complied with which conditions, the Board will issue a certificate.

Section 12 provides: "That any itinerant vendor of any drug, nostrum, ointment or application of any kind intended for the treatment of disease, or injury or who may, by writing, print or other methods, profess to cure or treat disease or deformity by any drug, nostrum, manipulation, or other expedient, in this State, shall, if found guilty, be fined in any sum not less than twenty-five (25)

dollars and not exceeding one hundred (100) dollars for each offense, to be recovered in an action of debt, before any Court of competent jurisdiction, or shall be imprisoned for a term of not less than ten (10) days or more than thirty (30) days, or be both fined and imprisoned."

Section 13. That a person shall be regarded as practicing medicine who shall append the letters M. D. and M. B. to his name, or repeatedly prescribe or direct, for the use of any person or persons, any drug or medicine, or other agency, for the treatment, cure or relief of any bodily injury, infirmity or disease, excepting farmers and planters on certain conditions when exclusively practicing without compensation, on their employees and tenants.

Section 14. That if any person shall practice medicine in any of its departments without first having obtained the certificate required by Section 1, an injunction may issue forbidding him from practicing medicine and provides for a penalty.

It will therefore be seen that the underlying and principal reason for the life of this Act was, and is, to regulate the practice of medicine, etc., in the State of Louisiana, and its sole and only object and purpose is to guard the public against quackery and charlatanism.

There are strong reasons relative to the public welfare, which make it proper that regulations concerning the practice of medicine should be confined to certain competent and qualified and authorized persons. The injury to the public health which might ultimately ensue, and the result, if prescribing and dispensing of drugs by inexperienced and unauthorized itinerant vendors of drugs were carelessly and promiscuously permitted to be done by these vendors, and purporting to prescribe medicines for

the cure and treatment of disease, and which might be something different from which the medicine or drug purported to be, would be so great as to be most dangerous to any community. There is no question that the police power of the State logically extends to the regulation of the practicing of medicine and the right to prescribe and dispense drugs and nostrums is the subject of legislative action and control.

That the section assailed has reference to the regulations of the practice of medicine by the itinerant vendors therein mentioned and comes squarely within the purview of the object of the Act, and they are to be treated as persons practicing medicine and not merely to be considered as mere sellers and vendors, has been clearly decided by the Supreme Court of the State of Louisiana in the case of *State ex rel. Wynne vs. Judge,* 106 La. 400.

The Court stated:

> "A careful consideration of Section 12 of Act 49 of 1894, leads, we think, to the conclusion that it was not intended to apply to the itinerant vendor, merely in his capacity of vendor, but that the lawmaker was undertaking to deal with him for the purpose of the Act, as a person professing to treat or cure disease or deformity by the use of drugs and nostrums, which he sells, or by manipulation or other expedients."

A similar question was presented in *People vs. Blue Mountain Joe,* 129 Ills., page ——, wherein was involved "an act regulating the practice of medicine" in that State.

The Court said:

> "Within the regulation of the practice of medicine must necessarily fall the right to determine or to provide means for the determination of, who may law-

fully exercise the right to practice medicine, and to execute such rules as shall determine what shall and what shall not be regarded as legitimate practice of the profession. The Statute was passed to protect the health and promote the welfare of society, and to protect it from imposition of fraud. The purpose was to prohibit and prevent fraud, deception, charlantry and quackery in the practice of the profession of medicine,—to prevent impericism, and bring the practice of medicine under such control, that as far as practicable, the ignorant and unscientific practitioner should be excluded. The right to prescribe medicines for the cure of disease, and to administer them fall clearly within the practice of medicine; *and the regulation of the sale of drugs and nostrums by itinerant vendors as clearly falls within the purpose of the act as expressed in the title.*"

Act 49 of 1894 of Louisiana provides for the regulation of the practice of medicine, etc., and among the regulations therein is the clear inhibition to itinerant vendors from selling drugs and nostrums for the cure of disease, etc., without possessing the qualifications provided by the Act, and the violation of such act is punished as a misdemeanor. The Act, and particularly Section 12, under which the Bill of Inforation was drawn, was construed by the Supreme Court of the State of Louisiana in *Wynne vs. Judge, supra,* as classifying the itinerant vendor of drugs as a practitioner of medicine. In the *Blue Mountain Joe Case,* construing a similar statute, a like construction was placed on the Illinois law. While these constructions are perhaps not conclusive, they are such at least upon which this Honorable Court will lean.

*Atchison Railroad Company vs. Matthews,* 174 U. S. 101.

*Merchants vs. Penna. Railroad Company*, 153 U. S. 380.

*Baltimore Traction Company vs. Bell Railroad Company*, 151 U. S. 137.

*Minneapolis, etc., R. R. Co.*, 193 U. S. 53.

*Collins vs. Texas*, 233 U. S. 294.

In *Reetz vs. Michigan*, 188 U. S. 506, this Court said:

> "The power of a State to make reasonable provisions for determining the qualifications of those engaged in the practice of medicine, and preventing those who attempt to engage therein in defiance of such statutory provisions, is not open to question. *Dent vs. W. Virginia*, 128 U. S. 114; *Hawker vs. New York*, 170 U. S. 189, and cases cited in the opinion."

It is contended by the plaintiff in error that itinerant vendors of drugs, etc., intended for the treatment of disease, etc., fall within the class as vendors of the same preparations who have fixed and permanent places of business. This contention is without force. The itinerant vendor of drugs, intended to be reached by the law, is not dealt with, in his capacity merely as a vendor, but only as an itinerant practitioner of medicine.

Even were the construction placed on this law by the plaintiff in error to be considered as propounded by him, the merchants and druggists with a fixed and permanent place of business is to be differentiated from the itinerant vendor.

The merchants and druggists, as a rule, deal with regular customers, and sell their goods to such persons as come to their places of business. They are not strangers. They have character, reliability and reputation to main-

tain. They have fixed places of business at which they can always be found, and where their drugs are always subject to government inspection. On the other hand, an itinerant vendor is not bound by any rules which govern a local merchant or druggist, who pay licenses for the purpose of carrying on their business. The object of the Legislature in passing the Act assailed herein was to protect competent and qualified physicians in their practice, and to protect the public as well as to guard the public from the imposition of quacks and charlatans. An itinerant vendor of drugs and selling these for the treatment of diseases, intended to be reached by the law, is an absolute stranger to every person in the country in which he offers his drugs and nostrums for sale. He has no professional or business reputation to maintain, or defend. He is here to-day; elsewhere to-morrow, perhaps never again to be heard of, therefore, the local dealer, and the itinerant vendor are separate and distinct classes.

To regulate the practice of medicine is clearly within the police power of the State, as to the determination between the unscientific and unqualified itinerant vendor of medicines for the treatment and cure of diseases or injuries, and the competent and qualified physician authorized under the law to practice his profession, and the local dealer, paying a license to do business at a fixed and permanent place, and is not an arbitrary power. The physician and the local dealers, with their professional and business reputations and probity behind them, are much less liable to prescribe and deal in drugs and medicines of questionable character, efficiency and quality, than the itinerant vendor, and they are less liable to make

misrepresentations in reference to the disease for which the medicines or drugs are specifics.

It was held, in the case of *State vs. Harrington*, 68 Vermont, 622 (34 L. R. A. 100), that:

"The police power of a State extends beyond the protection of health, peace, morals, education and good order. It is the power to govern men and things within the limits of its dominion. It comprehends all those general laws of internal revenue necessary to secure peace, good order, the health and comfort of society, and the regulation and protection of all property in the State. Its power in these respects is supreme. Desty. Taxn. 1377, and cases cited; Cooley Const., Lim. 704. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restrictions and regulations established by law, as to legislation, under the governing and controlling power vested in them by the State, made them necessary and expedient. * * *

"'The power we allude to is rather the police power, the power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe the limits of its exercise.

"'This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State.

"'According to the maxim, *Sic utere tuo ut alienum non laedas*, which, being of universal application, it must, of course, be within the range of legislative action to devise the mode and manner in which every one may so use his own as not to injure others.

"'The power of the State to impose restrictions and burdens upon persons and propery in the conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.' *Wilkinson vs. Rahrer* (*re Rahrer*), 140 U. S. 545."

There is no arbitrary violation or discrimination made in Act 49 of 1894. As it is stated by this Court in *Backtel vs. Wilson, Sheriff*, 204 U. S. 36:

> "While the State Legislatures may not arbitrarily select certain individuals for the operation of its statute, the selection, in order to be obnoxious to the equal protection clause of the Fourteenth Amendment, must be clearly and actually arbitrary, and not merely possibly so," and authorities therein cited.

We therefore pray that the judgment of the lower Court be affirmed.

Respectfully submitted,

R. G. PLEASANT,
*Attorney General of the State of Louisiana.*

G. A. GONDRAN,
*Of Counsel.*

# BACCUS *v.* STATE OF LOUISIANA.

ERROR TO THE THIRD JUDICIAL DISTRICT COURT, PARISH OF CLAIBORNE, STATE OF LOUISIANA.

No. 170. Argued January 19, 1914.—Decided February 24, 1914.

This court will not disregard the construction placed upon a state statute by the highest court of the State especially if it involves giving the statute one meaning for the purpose of determining whether the acts in question are within its terms and another meaning for the purpose of escaping the Federal question.

A State may classify and regulate itinerant vendors and peddlers, *Emert* v. *Missouri*, 156 U. S. 296, and may also regulate the sale of drugs and medicines.

The statute of Louisiana of 1894, prohibiting sale of drugs, etc., by itinerant vendors or peddlers, is not unconstitutional under the Fourteenth Amendment either as denying due process of law by preventing a citizen from pursuing a lawful vocation or as denying equal protection of the law.

THIS writ of error was directed to a district court of the State of Louisiana, as that court had jurisdiction, in last resort, over the conviction sought to be reviewed. The information upon which the conviction was based charged that the accused had, in violation of § 12 of Act 49 of the Laws of Louisiana for 1894, illegally, as an itinerant vendor or peddler, "sold drugs, ointments, nostrums and applications intended for the treatment of diseases and deformity." A motion was made to quash on the following

grounds: First, because the statute upon which the charge was based provided for no offense; second, because if it did, the acts charged were not, generally speaking, within the statute, and especially were not embraced by its provisions because the sale of drugs or proprietary preparations put up in sealed packages with directions for use, did not constitute the practice of medicine; third, because if the statute embraced, as asserted, the acts charged, it was in conflict with the state constitution, since it permitted all persons to sell drugs, ointments, etc., except itinerant vendors; fourth, because if the statute operated as contended for, it was repugnant to the Fourteenth Amendment to the Constitution of the United States "*a*, because it prevents a citizen from pursuing a lawful vocation; *b*, it denies to other citizens rights enjoyed by all others in the State, and . . . is class legislation in its effect, as it gives to the local dealer a monopoly in the sale of such drugs, etc., and deprives the itinerant vendor or dealer of the privilege to sell such articles . . ." The motion to quash having been overruled, the case was submitted to the court without a jury, upon an agreed statement of facts to the following effect: 1st, "that the defendant was an itinerant vendor of drugs, nostrums," etc., and as such had sold the articles "intended for the treatment of diseases as alleged in the information." 2nd, "that the drugs so sold by the defendant as an itinerant vendor were compounded and prepared by the Rawleigh Medical Co. of the State of Illinois, and that said remedies, drugs, nostrums, ointments and applications were put up in sealed packages or bottles ready for use with printed directions on the packages or bottles and that defendant was an itinerant vendor of same in original packages and bottles and prepared by the proprietors." 3rd, "that all persons except itinerant vendors have the right to sell said remedies, that is, patent and proprietary drugs, nostrums, ointments and applications, intended for the cure

of diseases." By requests to charge which were overruled, and to which exceptions were reserved, the defenses based both upon the state and the United States Constitution, embodied in the motion to quash were reiterated and on conviction and sentence after an unsuccessful effort by certiorari to procure as an act of grace, a review of the case by the Supreme Court of the State, this writ of error was sued out.

*Mr. Thomas D. O'Brien*, with whom *Mr. John A. Barnes* was on the brief, for plaintiff in error:

The act cannot be sustained if interpreted to prohibit the mere selling of drugs by an itinerant while permitting such selling by all others.

The enforcement of the statute would unwarrantably deprive plaintiff in error of liberty.

The business and occupation attempted to be prohibited is lawful.

The statute denies to plaintiff in error equal protection of the laws.

The statute is equally obnoxious under the construction placed upon it by the Supreme Court of Louisiana.

In support of these contentions see *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Barbier* v. *Connolly*, 113 U. S. 27; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Kentucky* v. *Payne Medicine Co.*, 138 Kentucky, 164; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Civil Rights Cases*, 109 U. S. 23; *Chicago* v. *Netcher*, 183 Illinois, 104; *Carrollton* v. *Bazzette*, 159 Illinois, 284; *Ex parte Virginia*, 100 U. S. 347; Food and Drug Regulations, Louisiana Board of Health, July 1, 1913; *Gundling* v. *Chicago*, 177 U. S. 183; *Hovey* v. *Elliott*, 167 U. S. 409; *Holden* v. *Hardy*, 169 U. S. 366; *In re Jacobs*, 98 N. Y. 98; *Lochner* v. *New York*, 198 U. S. 45; *Lawton* v. *Steele*, 152 U. S. 133; *Mugler* v. *Kansas*, 123 U. S. 623; *Noel* v. *People*, 187 U. S. 587; *Natl. Cotton Oil*

*Co.* v. *Texas*, 197 U. S. 129; *People* v. *Wilson*, 249 Illinois, 195; *Price* v. *People*, 193 Illinois, 114; *Scott* v. *McNeal*, 154 U. S. 34; *State* v. *Donaldson*, 41 Minnesota, 74; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; Second Revised Laws of Louisiana, p. 1232; *State* v. *Loomis*, 115 Missouri, 313; *State* v. *Ashbrook*, 154 Missouri, 375; *Spiegler* v. *Chicago*, 216 U. S. 114; *State* v. *Scougal*, 3 So. Dak. 55; *State* v. *Bayer*, 34 Utah, 257; *State* v. *Judge*, 105 Louisiana, 371; *Wynne* v. *Judge*, 106 Louisiana, 400; *Pettigrew* v. *Hall*, 109 Louisiana, 290; *People* v. *Gilson*, 17 N. E. Rep. 343 (N. Y.); 34 Stat. 768, Food and Drugs Act; *Williams* v. *State*, 99 Arkansas, 149; Westervelt's Pure Food and Drug Laws; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

*Mr. R. G. Pleasant*, Attorney General of the State of Louisiana, and *Mr. G. A. Gondran* for defendant in error, submitted.

Mr. Chief Justice White, after making the foregoing statement, delivered the opinion of the court.

We accept the construction affixed by the court below to the statute and upon which alone it could in reason have held that the acts charged were embraced by its provisions. We hence disregard an intimation made in the argument of the defendant in error, that the statute is susceptible of a different interpretation and therefore that the claim of Federal right which was made below and which was necessarily passed upon need not be here considered. It is inconceivable that the statute should mean one thing for the purpose of determining whether the acts charged were within its terms and should then be held to mean another, for the purpose of escaping the Federal question. Thus considering the case in its true aspect, the single issue to be decided is, Did the State have power, without violating the equal protection or due process of

law clause of the Fourteenth Amendment, to forbid the sale by itinerant vendors of "any drug, nostrum, ointment or application of any kind intended for the treatment of disease or injury," although allowing the sale of such articles by other persons? That it did have such authority is so clearly the result of a previous ruling of this court (*Emert* v. *Missouri*, 156 U. S. 296), or at all events is so persuasively made manifest by the authorities cited and the reasoning which sustained the ruling of the court in the case just stated, as to leave no room for controversy on the subject (pp. 306–307). Moreover, the power which the state Government possessed to classify and regulate itinerant vendors or peddlers exerted in the statute under consideration is cumulatively sustained and made if possible more obviously lawful by the fact that the regulation in question deals with the selling by itinerant vendors or peddlers of drugs or medicinal compounds, objects plainly within the power of government to regulate.

*Affirmed.*